

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

MARY M. HULL, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 04-B-1264 (OES)  
 )  
 UNITED STATES DEPARTMENT )  
 OF LABOR, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

DECLARATION OF MIRIAM McD. MILLER

MIRIAM McD. MILLER, pursuant to the provisions of 28  
U.S.C. § 1746, declares as follows:

1. I am Co-Counsel for Administrative Law, Office of  
the Solicitor (SOL), U.S. Department of Labor, and I have held  
that position since 1987. Prior to becoming Co-Counsel for  
Administrative Law, I was responsible for recommending to the  
Solicitor of Labor appropriate dispositive action on  
administrative appeals made pursuant to the Freedom of  
Information Act (FOIA) and the Privacy Act of 1974. The  
Solicitor of Labor has the final authority within the  
Department for granting or denying the foregoing appeals. As  
Co-Counsel for Administrative Law, I am responsible for  
supervising the defense, in conjunction with the Department of  
Justice, of all suits brought against the Department of Labor

under FOIA and the Privacy Act.

2. The statements made in this declaration are based upon my personal knowledge or upon information available to me in my official capacity and are true and correct to the best of my knowledge.

3. I am familiar with the Department's processing procedures governing requests and administrative appeals made pursuant to FOIA and the Privacy Act. In particular, I am familiar with the FOIA request dated March 3, 2004 submitted by Curtis L. Kennedy, who represents Plaintiff, Mary M. Hull. See Exhibit A-1. He asked for "all agency records of the Department of Labor's enforcement investigation, audit and examination from 2001 to the present of the Qwest Pension Plan, formerly known as the U S WEST Pension Plan, including written and electronic (e-mail) communications with plan administrators and fiduciaries, plan legal counsel, plan actuaries, plan accountants and plan advisors incident to the ongoing investigation." Id.

4. On March 4, 2004, the Acting Regional Director of the Department's Employee Benefits Security Administration (EBSA) denied Mr. Kennedy's request based on FOIA Exemption 7(A), which authorizes the withholding of "records or information compiled for law enforcement purposes, but only to

the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). See Exhibit A-2.

5. On March 16, 2004, Mr. Kennedy appealed to the SOL. See Exhibit A-3.

6. In a letter dated June 16, 2004, Bruce Cohen, Deputy Associate Solicitor for Legislation and Legal Counsel, affirmed EBSA's decision to withhold the records under FOIA Exemption 7(A). See Exhibit A-4. His decision was based on his findings that (1) the documents are records or information compiled for law enforcement purposes; (2) a final decision in the underlying proceedings for which the information is being used has not been reached; and (3) disclosure at this time could reasonably be expected to interfere with enforcement proceedings. Id. Mr. Cohen's decision was informed by a letter from EBSA's Acting Regional Director stating that the investigation was "currently open and may be subject to further enforcement proceedings by our agency and the Internal Revenue Service." See Exhibit A-5. After reviewing the file, the Acting Director concluded that Exemption 7(A) could not be waived because "release of this information could be detrimental to further proceedings." Id.

7. This civil action was filed on June 18, 2004.

8. In this case, EBSA's investigative file consists of 6,587 consecutively numbered pages of records that are organized into 13 numbered volumes. In turn, each volume contains numbered exhibits. See Exhibit A-6.<sup>1</sup>

9. After the civil action was filed, EBSA released a substantial amount of information from the investigative file consisting of one CD, one floppy disk, and 4,275 pages of information. See Exhibits A-6, A-7. EBSA, however, withheld some information under certain FOIA exemptions. See Exhibits A-6, A-7.

10. This case involves Plaintiff's request for records compiled for an ongoing investigation arising under the Employee Retirement Income Security Act of 1974 (ERISA). Section 504 of ERISA, 29 U.S.C. § 1134, expressly confers upon the Secretary of Labor the direct responsibility and authority to investigate actual or potential fiduciary violations of ERISA Title I and its implementing regulations. See Exhibit A-8 (EBSA Enforcement Manual, Chapter 10, "Investigative

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<sup>1</sup> Exhibit A-6 consists of a separate chart for each volume of the investigative file. Each chart then shows the exhibit number of each document in the volume (if an exhibit number has been designated); a description of each document; the FOIA exemptions invoked (if any); pertinent comments; and the page numbers. Documents in bold print have been entirely withheld.

Authority"). These investigations are conducted by EBSA investigators in accordance with an Enforcement Manual, which is posted on EBSA's website. See Exhibit A-9 (EBSA Enforcement Manual, Chapter 48, "Fiduciary Investigations Program"). At the conclusion of an investigation, EBSA may refer the case to SOL to determine whether or not an action to remedy an alleged breach of fiduciary duty should be filed in a United States district court on behalf of the Secretary of Labor. See 29 U.S.C. § 1132 (authorizing the Secretary of Labor; plan participants and beneficiaries; and plan fiduciaries to sue to remedy alleged breaches of fiduciary duty).

11. The investigative files created in connection with EBSA's investigation and enforcement activities authorized by ERISA, are subject to the protection of FOIA Exemption 7, which applies to "records or information compiled for law enforcement purposes . . . ." 5 U.S.C. § 552(B)(7). All of the records in this case were compiled by EBSA for the purpose of initiating enforcement proceedings under ERISA. Thus, all of the records in this case are subject to protection from disclosure under FOIA Exemption 7.

12. **Exemption 7(A)**. Because EBSA's investigation of Qwest is an ongoing investigation, the records in this case

are exempt from disclosure under FOIA Exemption 7(A) to the extent that disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Applying Exemption 7(A) is a two-step process. The first question is whether a law enforcement proceeding is pending or prospective. Here, it is undisputed that EBSA's investigation of Qwest is a pending civil law enforcement investigation.

13. Second, it must be determined whether release of information involving the law enforcement proceeding could reasonably be expected to cause some articulable harm. It is well-established that Exemption 7(A) applies "whenever the government's case in court would be harmed by the premature release of evidence or information," or when disclosure would impede any necessary investigation prior to the enforcement proceeding. Under Exemption 7(A), an agency may specify the distinct, generic categories of documents at issue and the harm that would result from their release. This functional approach requires the agency to (1) define its categories functionally; (2) conduct a document-by-document review to assign each document to the proper category; and (3) explain how the release of each category would interfere with the enforcement proceedings.

14. In this case, EBSA withheld documents under Exemption 7(A) and also redacted certain information in the disclosed documents under Exemption 7(A). Each document in the investigative file was carefully reviewed with the assistance of the EBSA investigator. The purpose of the review was to determine whether disclosure of information "could reasonably be expected to interfere with enforcement proceedings." After reviewing the contents of each document, EBSA decided that it was reasonable to withhold five categories of documents in their entirety to avoid interference with possible enforcement proceedings against Qwest. The five categories are: (1) documents listing and organizing evidence,<sup>2</sup> (2) correspondence related to the collection and analysis of evidence,<sup>3</sup> (3) documents generated in a negotiation between EBSA and Qwest that included consideration of the open issue,<sup>4</sup> (4) twenty-four witness

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<sup>2</sup> These documents include EBSA's case file descriptions (Form 205) (5 pages), the case file indices (32 pages), the investigator's report of records examinations and spreadsheets (14 pages), and a copy of the information stored on the investigator's computer (11 floppy disks).

<sup>3</sup> These documents include letters and memoranda (82 pages) and e-mail correspondence (17 pages).

<sup>4</sup> The correspondence and draft documents consist of 173 pages.

statements,<sup>5</sup> and (5) approximately 1,000 pages and two floppy disks of data that supports EBSA's investigation of the open issue.<sup>6</sup>

15. EBSA is withholding the documents listing and organizing the evidence (Category 1) because they reveal the scope of the investigation and the government's theory of the case. Thus, public disclosure of those documents before completion of the investigation would permit Qwest to take pre-emptive measures to avoid liability in any future enforcement proceeding arising from the investigation.

16. Similarly, EBSA is withholding the correspondence related to the collection and analysis of the evidence (Category 2). Disclosure of these documents would reveal the exact nature of EBSA's case against Qwest, which would enable it to gain an unfair advantage in any future enforcement proceedings.

17. EBSA is also withholding certain documents generated

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<sup>5</sup> The investigative file contains multiple copies of some of the withheld witness statements.

<sup>6</sup> The Department has asserted Exemption 7(A) with regard to these records despite the applicability of other FOIA exemptions. If the Court agrees with the Department's assertion of Exemption 7(A), it is unnecessary to address the other exemptions. On the other hand, if the Court disagrees with the Department's assertion of Exemption 7(A) with regard to these records, the Department requests an opportunity to address the other applicable exemptions.

during its negotiations with Qwest. Those negotiations took into account the open issue (Category 3). Although the negotiations did not directly involve the open issue, they essentially expose the status of the investigation. Public access to documents revealing the status of the investigation could trigger public interference with the investigation, and therefore hamper its progress.

18. EBSA is withholding twenty-four witness statements (Category 4) because disclosure of these statements to the public before the investigation is complete could expose those witnesses to intimidation. Accordingly, releasing these statements could undermine the evidence EBSA has compiled in anticipation of an enforcement proceeding.

19. Finally, EBSA is withholding the underlying data related to the open issue (Category 5). Releasing this information prematurely therefore could jeopardize any enforcement proceeding against Qwest by divulging the details underlying EBSA's enforcement strategy.

20. All the documents completely withheld under Exemption 7(A) have been reviewed for segregability. See Exhibit A-6. The nonexempt information in those documents consists of essentially meaningless words and phrases. Accordingly, those documents have been entirely withheld under

Exemption 7(A).

21. EBSA also redacted certain information in the documents released to the Plaintiff under Exemption 7(A). The identity of the EBSA investigator (designated as "Inv. ID") denoted by a name, initials, direct telephone number, e-mail address, or other identifying information and EBSA's case number have been withheld under Exemption 7(A). See Exhibit A-6. Public disclosure of the identity of EBSA's investigator and EBSA's case number before the investigation is completed could compromise the integrity of the investigation by exposing internal, non-public agency information to members of the general public, who could misuse the information to hinder the investigation. Thus, premature disclosure of the identity of EBSA's investigator and the EBSA case file could interfere with the course of the pending investigation before any enforcement action has been instituted.

22. This case also involves information that is unrelated to the issue under investigation, but nevertheless has been withheld under FOIA Exemptions 2, 3, 4, 5, 7(C), and 7(E). See Exhibit A-6.

23. **Exemption 7(C).** EBSA redacted information in the released documents under Exemption 7(C) of FOIA. Exemption 7(C) provides protection for personal information maintained

in law enforcement records. To apply Exemption 7(C), an agency must first identify and evaluate the privacy interest(s), if any, implicated in the requested records. If a privacy interest exists, the public interests then must be assessed. In this regard, the requester must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the requester must show the information is likely to advance that interest. See NARA v. Favish, 124 S.Ct. 1570, 1580-82 (2004).

24. Exemption 7(C) regularly has been applied to withhold references to people who are not targets of the investigation and were merely mentioned in the law enforcement file. Accordingly, the names, social security numbers, and other identifying information about such people (designated as "names" on the attached charts) has been redacted under Exemption 7(C) from the documents released to the Plaintiff. See Exhibit A-6. No public interest would be served by revealing the names of these low ranking people.

25. **Exemption 7(E)**. EBSA is withholding a page from a print-out dated August 11, 1999 that contains the status of cases in EBSA's Office of Exemptions and Determinations (p. 758) and Form 205: EBSA's Closed Case Summaries (Form 205)

(pp. 750-757) under FOIA Exemption 7(E). Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The printout and the Form 205 reveal techniques and procedures used in the internal management of EBSA's system of enforcement. Disclosure of this information could reasonably be expected to risk circumvention of the law because it could be used by targets of future investigations to forestall EBSA's enforcement activities.

26. **Exemption 2.** The print-out and Form 205 discussed above are also being withheld under FOIA Exemption 2. Exemption 2 protects from disclosure "matters that are . . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Courts have developed two interpretations of Exemption 2 - "low 2" and "high 2." The print-out and Form 205 fall within the "high 2" category of protected information.

27. In Crooker v. Bureau of Alcohol Tobacco & Firearms,

670 F.2d 1051, 1073-1074 (D.C. Cir. 1981) (en banc), the court formulated what has become widely accepted as the test for "high 2" exempt information: if a document is "predominantly internal" and if its disclosure would significantly risk circumvention of agency regulation or statute, it is exempt from disclosure under Exemption 2. Information is "predominantly internal" if it was developed for internal use and does not constitute "secret law" - that is, it does not purport to regulate conduct among members of the public or set standards to be followed agency personnel in deciding whether to take actions affecting members of the public.

28. Here, the print-out and the Form 205 qualify as exempt "high 2" information because they are "predominantly internal" having been developed by EBSA for use by EBSA and are in fact used predominantly by EBSA. And, they do not contain any sort of "secret law." Disclosure of these documents would risk circumvention of the law for the same reasons as discussed above under law enforcement Exemption 7(E). This information could be used by targets of EBSA investigations to predict the nature and scope the agency's enforcement actions, and therefore avoid them.

29. **Exemption 3.** Exemption 3 incorporates the various nondisclosure provisions that are contained in other federal

statutes. In this case, Exemption 3 has been invoked to protect from disclosure Schedules SSN and F attached to the IRS Forms 5500 located in Volume I, Exs. 10, 11, and 12. See Exhibit A-6. Those documents are protected from disclosure by 26 U.S.C. § 6103.

30. **Exemption 4.** Exemption 4 of the FOIA protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. Exemption 4 therefore allows an agency to protect the interests of those who submit commercial or financial information to the government.

31. In this regard, four contracts have been withheld under Exemption 4. See Exhibit A-6. Specifically, a custom agreement for services between U S West and Towers Perrin (pp. 951-999); an agreement for services between U S West and Bankers Trust (pp. 878-935); terms and conditions of engagement between Watson Wyatt and Qwest (pp. 874-8770; and project contracts between Qwest and Towers Perrin (pp. 860-873). Releasing these contracts to the public could put the contracting parties at a commercial disadvantage by revealing the terms of their agreements to their competitors. Moreover, these types of service contracts are not customarily released to the public.

32. **Executive Order 12,600.** In order to properly determine and assess the interests affected by Exemption 4, Executive Order 12,600 and the Department's implementing regulations, 29 C.F.R. § 70.26, provide that submitters of commercial or financial data should be afforded an opportunity to provide input prior to a final disclosure determination whenever the agency has a belief that disclosure could cause competitive harm. This makes sense because each submitter's circumstances are likely to be unique, and therefore it is imperative to obtain the submitter's input before making a final decision.

33. Moreover, since the Supreme Court's decision in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), submitters have a right to challenge an agency's decision to disclose information by bringing a "reverse FOIA" action under the APA, which is subject to the arbitrary and capricious standard of review. In a "reverse FOIA" case, the reviewing court considers the administrative record created by the agency during its decision-making process. The Office of the Solicitor therefore consistently advises agencies within the Department to comply with Executive Order 12,600 and the Department's implementing regulations whenever there has been a FOIA request for commercial or financial information

obtained from a person by creating an administrative record. Specifically, the Solicitor's Office recommends that when an agency believes disclosure would cause commercial harm, it should contact the submitter.

34. The investigation in this case involves confidential commercial information submitted to EBSA by Qwest. As required by E.O. 12,600 and the Department's implementing regulations, copies of these documents were sent to Qwest to afford it the opportunity to object to disclosure of them. In a letter dated September 24, 2004, Qwest responded by designating certain documents that it believes contain confidential commercial information that should be protected from public disclosure. In support of its objections to disclosure of the designated documents, Qwest provided the affidavits of Felicity O'Herron and Alyson Buchanan. See Exhibit A-10. After considering Qwest's objections and the supporting affidavits, the Department has determined that the documents designated by Qwest in Exhibits A, B, C, D, and E, which are attached to its September 24, 2004 letter, contain confidential commercial information, and therefore should be withheld under Exemption 4. See Exhibit A-10; see also Exhibit A-6 (showing the designated documents withheld under Exemption 4).

35. In its September 24, 2004 letter, Qwest also requested protection from disclosure of its bank account numbers. The Department believes that Qwest's bank account numbers constitute confidential commercial information that should be withheld under Exemption 4. Accordingly, pursuant to Exemption 4, Qwest's bank account numbers have been redacted from the documents released to the Plaintiff. See Exhibit A-6.

36. **Exemption 5.** Exemption 5 permits an agency to withhold inter-agency and intra-agency memoranda and letters that are not routinely discoverable in the civil discovery context. Exemption 5 therefore incorporates the common law privileges such as the deliberative process privilege, which is invoked to protect a page of EBSA's caseload print-out (pp. 758), an EBSA Form 205 that summarizes information about a closed EBSA investigation (pp. 750-757), and a letter dated January 21, 2003 from an IRS agent to the EBSA investigation discussing the strategy for this investigation (pp. 5734-5736).

37. As a threshold matter, Exemption 5 pertains to "inter-agency or intra-agency" communications. Each of the documents withheld under Exemption 5 in this case was created and circulated to governmental officials. All three documents

therefore are either inter-agency or intra-agency communications.

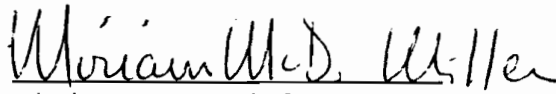
38. **Deliberative process privilege.** The deliberative process privilege is sometimes called the "executive privilege." Before the deliberative process privilege can be asserted, two requirements must be satisfied. First, the communication must be predecisional, i.e., antecedent to the adoption of agency policy. Second, the communication must be deliberative, i.e., a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. So long as a document is generated as part of a continuing process of agency decisionmaking, Exemption 5 may be applied.

39. The three inter-agency and intra-agency documents are being withheld are predecisional because each plays a role in the Department's ultimate determination of what course of action to take with regard to Qwest. Moreover, the three documents are deliberative because each was created during the investigative phase of EBSA's decision-making process regarding the outcome of this case.

40. Each document discussed above in paragraphs 25-39 that was entirely withheld under Exemptions 7(E), 2, 3, 4, and 5 was reviewed for segregability pursuant to 5 U.S.C. § 552(b)

of FOIA. Segregation of the nonexempt information in these documents would produce an unintelligible FOIA response. Accordingly, these documents were entirely withheld.

I declare under penalty of perjury that the foregoing is true and correct.

  
Miriam McD. Miller  
Co-Counsel for Administrative Law

Executed on March 30, 2005.

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Phone (303) 308-5714  
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Steven E. Christoffersen  
Senior Attorney



**VIA EXPRESS MAIL**

September 24, 2004

Steven R. Eischen  
Regional Director  
Employee Benefits Security Administration  
1100 Main Street, Suite 1200  
Kansas City, MO 64105

Re: Response to Freedom of Information Act Request Related to the  
Qwest Pension Plan

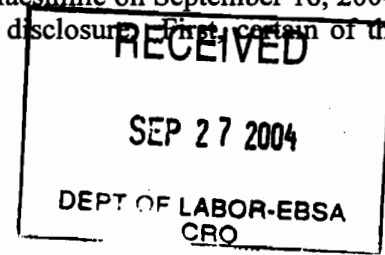
Dear Mr. Eischen:

We have completed our review of the documents relating to the Qwest Pension Plan (the "Plan") enclosed with your letter dated August 6, 2004, as well as the supplemental documents provided by Investigator John Mayers on September 16, 2004. These documents were provided to us as in connection with a civil action brought against the U.S. Department of Labor ("DOL") in the United States District for the District of Colorado (Civil Action No. 04-B-1264) by Mary M. Hull under the Freedom of Information Act (5 U.S.C. § 552) ("FOIA"). The requesting party seeks the release of the following materials:

[A]ll agency records of the Department of Labor's enforcement investigation, audit and examination from 2001 to the present of the Qwest Pension Plan, formerly known as the U S West Pension Plan, including written and electronic (e-mail) communications with plan administrators and fiduciaries, plan legal counsel, plan actuaries, plan accountants and plan advisors incident to the ongoing investigation, . . . [and] interview reports, informal and formal discovery requests, subpoenas and orders, and the written and electronic (e-mail) responses given thereto.

(Complaint at p. 4). You have asked for Qwest's view whether these documents should be released to the requesting party or whether they should be withheld in whole or in part based upon exemptions from disclosure under FOIA. For the following three reasons, certain of the documents that were enclosed with your August 6, 2004 letter, as well as the documents Mr. Mayers transmitted to this office by facsimile on September 16, 2004, (the "Protected Documents") should be withheld from disclosure. First, certain of the

*UE*  
**Exhibit A-10** *D*



Protected Documents are dated prior to 2001 and, thus, appear not to fall within the scope of Plaintiff's FOIA request. Second, certain of the Protected Documents contain information protected from disclosure under Exemption 4 of FOIA. Third, certain of the Protected Documents contain information protected from disclosure under Exemption 6 of FOIA.

**I. Pre-2001 Documents May Fall Outside the Scope of FOIA Request**

Initially, we note that the FOIA request can reasonably be interpreted to apply only to agency records "from 2001 to the present." Under this interpretation, the documents voluntarily submitted by Qwest to the DOL for its review dated from 1995 to 2000, listed by Bates number on **Exhibit F** hereto, fall outside of the time frame of Plaintiff's FOIA request. We ask that the DOL adopt this interpretation of the FOIA request and not disclose the documents identified on **Exhibit F** to Plaintiff in the FOIA action.

**II. Documents Falling Within Exemption 4 of FOIA**

Exemption 4 of FOIA excludes from disclosure (in relevant part) "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Protected Documents falling within the scope of Exemption 4 can be divided into the following five categories: (1) Investment Committee Meeting Minutes, Correspondence and Related Documents (**Exhibit A**); (2) Recommendations Pertaining to Plan Amendments (**Exhibit B**); (3) Qwest Asset Management Company's Annual Report for 2000 (**Exhibit C**); (4) Qwest Fiduciary Liability Insurance Policies (**Exhibit D**); and (5) Internal Correspondence and Documents regarding Plan Reimbursements (**Exhibit E**).

**A. Commercial or Financial Information**

In the context of Exemption 4, the terms "commercial" and "financial" are given their ordinary meanings. Merit Energy Co. v. U.S. Dept. of Interior, 180 F.Supp.2d 1184, 1187 (D. Colo. 2001); Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp.2d 19, 28 (D.D.C. 2000). Moreover, Exemption 4 applies where the submitter of the documents has a "commercial interest" in the information, and such terms are not limited to records that "reveal basic commercial operations." Judicial Watch, 108 F. Supp. 2d at 28.

The term "commercial" is defined as "occupied with or engaged in commerce or work intended for commerce," "of or relating to commerce," "characteristic of commerce," "suitable, adequate, or prepared for commerce," and "viewed with regard to profit." Webster's Ninth New Collegiate Dictionary 264-65 (1984). The term "financial" is defined as related to "money or other liquid resources of a government, business, group, or individual," "the system that includes the circulation of money, the granting of credit, the making of investments," and "the obtaining of funds or capital." Id. at 463.

Here, the Investment Committee Meeting Minutes, Correspondence, and Related Documents (“Minutes”) (**Exhibit A**) are clearly “financial” in nature as they concern information regarding fund allocations, fund performance, investment strategies, pension and post-retirement benefit costs, forecasting of expenses and pension plan payments, pension valuation, and invoices for services provided to Qwest’s investment advisor, the Qwest Asset Management Company (“QAM”).

The Recommendations Pertaining to Plan Amendments (“Plan Amendment Recommendations”) (**Exhibit B**) are “financial” in nature as they involve pension plan interest rates and valuation, pension plan payments, disability benefit payments, plan funding, and medical, dental, vision, and life insurance benefits. The Plan Amendment Recommendations are also “commercial” in nature because they discuss the business/commercial considerations behind amendments to the Plan.

The Qwest Asset Management Annual Report (“Annual Report”) (**Exhibit C**) is “commercial” in nature as it relates to QAM’s management of Qwest’s employee benefit assets and the U S West and Qwest Savings Plans. The Annual Report is also clearly “financial” in nature as it discusses QAM’s investment strategies for Qwest’s employee benefit trusts and Qwest’s and U S West’s savings plans, asset allocation, fund performance, and future performance projections.

The Qwest Fiduciary Liability Insurance Policies (“Insurance Policies”) (**Exhibit D**) are “financial” in nature as they provide information on Qwest’s insurance policy coverage, excess insurance policies, limits on liability, and insurance premiums and rates.

The Internal Correspondence and Documents regarding Plan Reimbursements (“Plan Reimbursements”) (**Exhibit E**) are clearly financial in nature because they relate to the payment of funds to the Plan in reimbursement for amounts erroneously paid or for which there was insufficient documentation.

**B. Obtained from a Person**

The term “person” is defined within the context of Exemption 4 as “an individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. § 551(2) (2004). The only type of entity that is not considered a “person” under Exemption 4 is an agency of the federal government. Judicial Watch, 108 F. Supp at 28. However, documents prepared by the federal government may be covered by Exemption 4 if they contain summaries or reformulations of information supplied by a source outside of the government. Id.

Here, all of the Protected Documents Qwest is seeking to have withheld were obtained by the DOL from Qwest, a corporation who is a “person” within the meaning of Exemption 4, or involve correspondence from the DOL to Qwest containing summaries or reformulations of information supplied by Qwest.

C. Privileged or Confidential

Qwest voluntarily provided the Protected Documents to the DOL and, thus, the determination of whether they should be deemed confidential is subject to the objective standard of confidentiality set forth in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992) (setting forth different standards of confidentiality for voluntary versus required submissions) (“Critical Mass”).

The “voluntariness” of Qwest’s submission of the Protected Documents to the DOL is determined not by whether the DOL possessed legal authority to require production of the Protected Documents, but by “whether the [DOL actually] exercised its authority to require such a submission.” FOIA Update, Vol. XIV, No. 2, at 1 (“Supreme Court Lets Critical Mass Stand”); see also FOIA Update, Vol. XIV, No. 2, at 4-5 (“OIP Guidance: The Critical Mass Distinction Under Exemption 4”) (setting forth the four basic Critical Mass principles that should be applied in distinguishing between “voluntary” and “required” information, including that “[t]he existence of agency authority to require an information submission does not automatically mean that that submission is ‘required.’ That authority must actually be exercised by the agency for the submission to be deemed ‘required’ in a given case.”); Critical Mass, 975 F.2d at 880 (holding that records were submitted voluntarily despite the fact that the agency held the legal authority to require their submission through the issuance of a subpoena because the agency had not in fact exercised that authority); Parker v. Bureau of Land Management, 141 F.Supp.2d 71, 78 n6 (D.D.C. 2001) (“In addition to possessing the authority to compel submission, the agency must also exercise that authority in order for a submission to be deemed mandatory . . . Indeed, in certain circumstances an agency may decline to require information that it has the authority to compel and instead pursue voluntary compliance.”); McDonnell Douglas Corp. v. United States EEOC, 922 F. Supp. 235, 242 (E.D. Mo. 1996) (“It simply is not correct that [because it possesses subpoena power] everything the [agency] might ask for qualifies as ‘required’ under the Critical Mass test.”).

Here, the DOL did not exercise enforcement authority through the issuance of a subpoena or otherwise to require the submission of the Protected Documents. Instead, they were voluntarily provided to the DOL in response to the investigator’s requests. Accordingly, the determination whether the Protected Documents should be deemed confidential is subject to the standard of confidentiality set forth in Critical Mass.

Not Customarily Disclosed to the Public

Under the Critical Mass test, information voluntarily disclosed to the government is deemed “confidential” “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” Critical Mass, 975 F.2d at 879; Merit Energy, 180 F.Supp.2d at 1188. In assessing customary disclosure, it is necessary to consider how Qwest (and its predecessor U S WEST) customarily treated the Protected Documents. See Center for Auto Safety v. Nat’l Highway Traffic Safety Administration, 244 F.3d 144, 148 (D.C. Cir. 2001) (“A party can voluntarily make protected disclosures

of information, and as long as the disclosures are not made to the general public, such disclosures do not constitute customary disclosures.”).

Qwest did not customarily disclose any of the Protected Documents to the public. Indeed, the Minutes and Annual Report were specifically designated as confidential by the company. See McDonnell Douglas, 922 F.Supp. at 242 (evidence indicated that the records were not customarily disclosed because all the documents were stamped “confidential”). The Investment Committee Minutes were stamped “Confidential,” and DOL Investigator John Mayers acknowledged in an email to Qwest that the Minutes were “a document for which Qwest requested confidential handling by the [DOL].” **Exhibit A**, Bates #'s 2950-2952. Similarly, the correspondence relating to the Investment Committee Minutes was not intended to be disclosed to the public. Rather, Qwest understood that this correspondence was itself confidential, related to a nonpublic inquiry. The Annual Report was also stamped “PROPRIETARY AND CONFIDENTIAL: Disclose and distribute solely to Qwest employees having a need to know.” **Exhibit C**, Bates #'s 2165-2193.

Although the Plan Amendment Recommendations (**Exhibit B**), Insurance Policies (**Exhibit D**), and Plan Reimbursements (**Exhibit E**) were not marked confidential, they also were not customarily disclosed to the public. In support thereof, Qwest hereby submits the affidavits of Felicity O’Herron and Alyson Buchanan as **Exhibits G and H**, respectively. Based upon these Affidavits, Qwest submits that Exemption 4 of FOIA applies to the Protected Documents and precludes them from disclosure.

### **III. Documents Falling Within Exemption 6 of FOIA**

Exemption 6 of FOIA protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 522(b)(6). This exemption extends to the names and Social Security Numbers of individuals found on documents requested under FOIA when there is no public interest advanced by the disclosure of that information. See Aronson v. U.S. Dept. of Housing and Urban Dev., 822 F.2d 182, 185-87 (1<sup>st</sup> Cir. 1987); Judicial Watch, Inc., 108 F. Supp.2d at 36-38.

Certain documents contain the names and Social Security Numbers of Plan participants (primarily, the claims adjudication documents). Because there is no public interest in the disclosure of this information, such personal information should be redacted prior to production in the FOIA action. Attached as **Exhibit I** are the documents we have found containing this information (the names and Social Security Numbers have been highlighted).

In addition, a number of documents contain active Qwest bank account numbers. These numbers should also be protected from disclosure, either under Exemption 4 (since they reflect financial information not customarily made available to the public) or Exemption 6 to FOIA. See Judicial Watch, Inc., 108 F. Supp.2d at 37 (bank account information could be used for “nefarious purposes” and “there is no public interest in this

information"). Attached as **Exhibit J** are the documents we have found containing bank account numbers which should be redacted before production in the FOIA action (the bank account numbers have been highlighted).

If you have any questions concerning this letter, please feel free to call me directly at 303-308-5714.

Sincerely,

A handwritten signature in cursive script that reads "Steven E. Christoffersen".

Steven E. Christoffersen  
Enclosures

cc: John Mayers (w/encl.)  
Rich Baer (w/out encl.)  
Karen DuWaldt (w/out encl.)



