

CURTIS L. KENNEDY

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ALSO ADMITTED IN:

UNITED STATES SUPREME COURT
STATE OF ARIZONA
STATE OF OKLAHOMA
STATE OF TEXAS
WASHINGTON, D.C.

March 3, 2004

Robert Webber,
Acting Regional Director
DEPARTMENT OF LABOR
1100 Main St., Suite 1200
Kansas City, MO 64105-5148
Tele: 816-426-5131, ext. 112
Fax: 816-426-5511

(Via Fax and First Class Mail)

Syd Canon,
FOIA Request Coordinator, Disclosure Officer
DEPARTMENT OF LABOR
1100 Main St., Suite 1200
Kansas City, MO 64105-5148
Tele: 816-426-5131, ext. 118

Re: Investigation of Qwest Pension Plan / **Freedom of Information Act Request**

Mr. Webber and Ms Canon:

Ms. Canon, thank you for your telephone call yesterday, in response to my February 24 letter about the ongoing investigation of the Qwest Pension Plan. In order to avoid any confusion about my inquiry, I want to go on record as having presently invoked the Freedom of Information Act (FOIA), as amended, 5 U.S.C. § 552. Since October 2003, I have been communicating with your office and awaiting confirmation of the DOL's conclusion of the ongoing investigation of the Qwest Pension Plan. I understand there is no one within the Kansas City office who is able to predict when the investigation will be concluded, if ever, and I am told that I should check back after the beginning of next year, 2005. The group of Qwest Pension Plan participants whom I represent are simply not satisfied with this report, and some have voiced concerns that the Department of Labor is simply stalling its work as part of an election year politics process.

Accordingly, please let this letter serve as an official FOIA request by myself and on behalf of the requesters identified herein, and notice of my agreement to pay the reasonable assessable fees associated with the DOL's processing of this request, as explained herein below.

As you know, FOIA has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process. The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. Since the Qwest / U S WEST merger in mid-2000, rumors have furiously circulated amongst Qwest Pension Plan participants about the scope, purpose and intent of the DOL's investigation. That the investigation is now well beyond a second year further fuels the level of uncertainty among thousands of Qwest Pension Plan participants who demand to know what is going on, and why?

Accordingly, a FOIA request is made 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. This request includes interview reports, informal and formal discovery requests, subpoenas and orders, and the written and electronic (e-mail) responses given thereto. Our position is that all matters concerning the Qwest Pension Plan's operation, investments and administration are not private matters subject to any FOIA exemption. Therefore, to the extent the DOL's position is to the contrary, we trust there will be an attempt to remove all alleged "exempt information" so as to make the documents suitable for release.

We understand that you will provide a written or electronic (e-mail) response within twenty (20) days and advise of the DOL's decision to grant, defer or refuse access to all or part of the documents we have requested, along with an explanation of the reasons for the decision and the fees to be charged to me. Thank you.

Sincerely,

Curtis L. Kennedy

Individual Requester, and on behalf of the Association of U S WEST/Qwest Retirees

Nelson B. Phelps, Individual Requester
QWEST PENSION PLAN PARTICIPANT
1500 So. Macon St.
Aurora, CO 80012-5141
Tele: 303-743-7928

Mary M. Hull, Individual Requester
QWEST PENSION PLAN PARTICIPANT
8729 West Port Royale Lane
Peoria, AZ 85381
Tele: 623-815-1938

c: Association of U S WEST/Qwest Retirees (general membership)



March 4, 2004

Mr. Curtis L. Kennedy
Attorney at Law
8405 E. Princeton Avenue
Denver, CO 80237-1741

Re: Qwest Pension Plan

Dear Mr. Kennedy:

Your Freedom of Information Act request was received in this office on March 3, 2004. You are requesting information relating to our investigation of Qwest Pension Plan.

The information you are seeking is part of an ongoing investigation. I am denying release of this information under Exemption 7(A). This exemption protects information concerning pending or prospective law enforcement proceedings, the disclosure of which could reasonably be expected to interfere with that proceeding.

Department of Labor regulations provide that any applicant whose request for records is denied in whole or in part may file an appeal within 90 days from the date the response is received by the applicant. If an appeal is made, it must be in writing and must state the grounds for appeal including any supporting statements or arguments. An appeal should be addressed to the Solicitor of Labor, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C., 20010. To expedite processing, the envelope and appeal should be clearly labeled "FOIA Appeal".

If you have any questions regarding this response or if you need further assistance, you may contact Syd Canon at (816) 426-5121 ext. 118.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Webber". The signature is fluid and cursive, written over a white background.

ROBERT L. WEBBER
Acting Regional Director

CURTIS L. KENNEDY
ATTORNEY AT LAW

**8405 E. PRINCETON AVE.
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FAX (303) 843-0360

ALSO ADMITTED IN:

UNITED STATES SUPREME COURT
STATE OF ARIZONA
STATE OF OKLAHOMA
STATE OF TEXAS
WASHINGTON, D.C.

March 16, 2004

Howard M. Radzely
Solicitor of Labor
Office of the Solicitor
Division of Legal Counsel
DEPARTMENT OF LABOR
Francis Perkins Building, Room N-2428
200 Constitution Avenue NW
Washington, DC 20010

(Via First Class Mail)

Re: **Freedom of Information Act Request – APPEAL**
March 4, 2004 FOIA Denial
March 3, 2004 FOIA Request

Solicitor Radzely:

This is a timely appeal submitted under the Freedom of Information Act (FOIA), as amended, 5 U.S.C. § 552, of the March 4, 2004, decision letter from Acting Regional Director Robert L. Webber fully denying the March 3, 2004, FOIA request served on the Employee Benefits Security Administration in Kansas City. Copies of both my March 3 letter and Mr. Webber's March 4 letter are attached hereto. The FOIA request concerns information about the Qwest Pension Plan. Accordingly, please let this letter serve as an appeal by myself and on behalf of the requesters identified in the March 3 letter.

The March 3, 2004 FOIA request was 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. The FOIA request included interview reports, informal and formal discovery requests, subpoenas and orders, and the written and electronic (e-mail) responses given thereto.

Acting Director Webber invokes Exemption 7(A) under FOIA, which exemption 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.” It is our position that Exemption 7(A) is being abused. It should be beyond question that Exemption 7(A) is temporal in nature and is not intended to endlessly protect material simply because requested papers are in some investigatory file somewhere in the Kansas City office. Furthermore, Mr. Webber says nothing about whether any enforcement proceedings are a real possibility. There is no legal action pending. Mr. Webber states that “the information [we] are seeking is part of an ongoing investigation.” He chose his words carefully. He does not say “ongoing law enforcement investigation.” Exemption 7(A) may be invoked so long as a law enforcement proceeding is pending, or so long as an enforcement proceeding is fairly regarded as prospective or as preventative. Unfortunately, Mr. Webber’s rudimentary statement leaves Qwest Pension Plan participants to guess whether any “prospective” law enforcement proceeding has either a concrete possibility or is merely hypothetical. What are they to think? Is there a prospective criminal action? civil action? regulatory proceeding? Mr. Webber should have pointed to a specific pending or contemplated law enforcement proceeding that could be harmed by the requested disclosure. Mr. Webber did not do that. Moreover, he did not bother to specify the distinct, generic categories of documents at issue and the harm that would result from their release to me and the requesters.

Clearly, Acting Director Webber’s *blanket* denial does not comply with either the letter or spirit of FOIA. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and FOIA has become an integral part of that process. FOIA has been one of the primary means by which members of the public inform themselves about their government. Since the Qwest / U S WEST merger in mid-2000, rumors have furiously circulated amongst Qwest Pension Plan participants about the scope, purpose and intent of the DOL’s investigation launched by officials in the Kansas City office. That the investigation is now well beyond a second year and, reportedly nothing is happening, further fuels the level of uncertainty among thousands of Qwest Pension Plan participants who demand to know what is going on, and why?

Mr. Solicitor, if the Kansas City DOL office is allowed to withhold all the requested pension plan related information simply because Mr. Webber, or someone in his office, might imagine that the requested information *might* have some bearing on some hypothetical enforcement proceeding concerning the Qwest Pension Plan, the FOIA is rendered meaningless. We don’t believe the requested information can be refused just because the law enforcement arm of the DOL asserts, without a firm basis, that release would interfere with future actions.

Even if we assume that Qwest is a potential target for either a criminal, civil or regulatory proceeding by the DOL, isn't virtually all of the FOIA requested information that which was provided by Qwest? We do not believe Exemption 7(A) affords protection when the target of the investigation has possession of the FOIA requested information or submitted the very information in question. How could there be any harm to Qwest or the DOL by allowing us access to Qwest Pension Plan related documents produced by Qwest? The documents relate to the funded trust established and maintained specifically for the exclusive benefit of Qwest Pension Plan participants, not Qwest. Revealing the requested documents is certainly not going to reveal anything not already known by Qwest.

A distinguishing feature of FOIA is that the agency, the Kansas City DOL office, bears the burden of sustaining its action of withholding records. That burden cannot be met in this instance. Therefore, we request that you reverse Mr. Webber's decision and direct his office to promptly grant me and the requesters access to all or part of the documents we have requested. Thank you.

Sincerely,



Curtis L. Kennedy

Individual Requester, and on behalf of the Association of U S WEST/Qwest Retirees

Nelson B. Phelps, Individual Requester
QWEST PENSION PLAN PARTICIPANT
1500 So. Macon St.
Aurora, CO 80012-5141
Tele: 303-743-7928

Mary M. Hull, Individual Requester
QWEST PENSION PLAN PARTICIPANT
8729 West Port Royale Lane
Peoria, AZ 85381
Tele: 623-815-1938

Attachment

c: Association of U S WEST/Qwest Retirees (general membership)

Timothy D. Hauser, Esq.
Associate Solicitor
Plan Benefits Security Division
U. S DEPARTMENT OF LABOR
P.O. Box 1914
Washington, D.C. 20013
Tele: 202-693-5600
Fax: 202-693-5610

(Via First Class Mail)



JUN 16 2004

Curtis Kennedy, Esq.
Attorney at Law
8405 E. Princeton Avenue
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., Southham 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