



## **Exemption 9**

Exemption 9 of the Freedom of Information Act protects from disclosure "geological and geophysical information and data, including maps, concerning wells."<sup>1</sup>

The Court of Appeals for the District of Columbia Circuit has held that the analysis of Exemption 9 "start[s] with its text."<sup>2</sup> In AquAlliance v. U.S. Bureau of Reclamation, the D.C. Circuit affirmed the district court's determination that Exemption 9 permitted the withholding of information about the location and depth of water wells.<sup>3</sup> The court found no ambiguity in the phrase "geological and geophysical" and ruled that well depth and location would "necessarily disclose geological or geophysical information" and so fell "squarely within Exemption 9."<sup>4</sup> The D.C. Circuit rejected the plaintiff's "objections to that plain-text reading" and declined the plaintiff's suggestion to "engraft[] a competitive-advantage limitation onto the text."<sup>5</sup> It also rejected the plaintiff's argument that water wells be excluded from the protection of Exemption 9 by finding that "[t]he ordinary meaning of 'wells' includes water wells" and that "the depth and location of wells straightforwardly qualifies as 'geological and geophysical information.'"<sup>6</sup> Further, the D.C. Circuit rejected the plaintiff's argument that Congress intended to limit the application of Exemption 9 to oil and gas wells when noting that the statutory text contains no "adjectival limitation" on the word "wells."<sup>7</sup> Finally, the D.C. Circuit rejected

---

<sup>1</sup> [5 U.S.C. § 552\(b\)\(9\) \(2018\)](#).

<sup>2</sup> AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 104 (D.C. Cir. 2017) (quoting Milner v. Dep't of the Navy, 562 U.S. 562, 569 (2011)).

<sup>3</sup> Id. at 105-06 (holding that "[t]he proper course . . . is for [the] court to assume that Congress meant what it said, and said what it meant").

<sup>4</sup> Id. at 104.

<sup>5</sup> Id. at 104-05.

<sup>6</sup> Id. at 104.

<sup>7</sup> Id. at 105; see also Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188, 1196 (S.D. Cal. 2002) (holding that information including "ground water inventories, [water] well yield in

the plaintiff's references to the legislative history of Exemption 9 by noting that legislative history should only be used to "illuminate ambiguous text" and concluding that "there is nothing ambiguous about Exemption 9's unqualified reference to 'wells.'"<sup>8</sup>

Relatedly, in National Resources Defense Council v. Department of Defense,<sup>9</sup> the District Court for the Central District of California rejected the plaintiff's reliance on legislative history in holding that the FOIA does not distinguish between information pertaining to privately and publicly owned water wells.<sup>10</sup> The court observed that "reference to legislative history is inappropriate when the text of the statute is unambiguous."<sup>11</sup>

The District Court for the District of Columbia also specifically analyzed the word "wells" in Story of Stuff Project v. U.S. Forest Service.<sup>12</sup> The court held that this term includes borehole maps and related information.<sup>13</sup> The court reasoned that "[a] 'well' is a 'hole or shaft sunk into the earth to obtain a fluid, such as water, oil, or natural gas,'" and a "[b]orehole" has also been defined as a "deep, narrow hole made in the ground, especially to locate water or oil."<sup>14</sup> The court found that "[t]hese definitions make it clear that a borehole is a type of well" because "[b]oth terms refer to a hole created in the earth to obtain a fluid."<sup>15</sup>

---

gallons per minute, and the thickness of the decomposed granite aquifer" was exempt from disclosure under Exemption 9).

<sup>8</sup> AquAlliance, 856 F.3d at 105 (quoting Milner, 562 U.S. at 572).

<sup>9</sup> 388 F. Supp. 2d 1086 (C.D. Cal. 2005).

<sup>10</sup> Id. at 1107-08 (noting plaintiff's reliance on H.R. Rep. No. 89-1497, at 32 (1966), 1966 U.S.C.C.A.N. 2418, 2428, which states that Exemption 9 was created "after witnesses testified that geological maps based on explorations by private oil companies were not covered by the 'trade secrets' provisions of . . . [then-existing] laws").

<sup>11</sup> Id. at 1108 (quoting United States v. Sioux, 362 F.3d 1241, 1246-47 (9th Cir. 2004)).

<sup>12</sup> 366 F. Supp. 3d 66, 81 (D.D.C. 2019).

<sup>13</sup> Id. at 81-82 (relating that "[a] 'borehole' is 'a hole bored or drilled in the earth, such as an exploratory well' or a 'small-diameter well drilled especially to obtain water'").

<sup>14</sup> Id. at 81.

<sup>15</sup> Id.

One court denied protection under Exemption 9 when the information at issue was found not to fall within its scope.<sup>16</sup> In Natural Resources Defense Council, Inc. v. U.S. Department of Interior, the District Court for the Southern District of New York determined that Exemption 9's use of the word "wells" should not be read to include "drilling holes used to extract coal."<sup>17</sup> The court found that "[w]ells are not used to extract solid matter such as coal; they are used to extract liquids or gases."<sup>18</sup> As a result, the court held that it was "constrained not to read Exemption 9 so broadly as to encompass the coal drill holes" at issue.<sup>19</sup>

In 1984, the District Court for South Dakota narrowly construed Exemption 9 in Black Hills Alliance v. U.S. Forest Service<sup>20</sup> and determined it applies only to "well information of a technical or scientific nature."<sup>21</sup> In support of its decision to order the release of generalized well data, the court pointed to the legislative history of Exemption 9 as evidence that Congress intended Exemption 9 to protect the oil and gas exploration and extraction industry from unfair competitive harm by "speculators."<sup>22</sup> The court concluded that general mineral exploration data such as the location, depth, or number of exploration drill holes "falls short of the technical and scientific information envisioned by Congress."<sup>23</sup>

---

<sup>16</sup> See Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, 36 F. Supp. 3d 384, 416 (S.D.N.Y. 2014) (noting that "FOIA exemptions 'are explicitly made exclusive, and must be narrowly construed'" (quoting Milner, 562 U.S. at 564)).

<sup>17</sup> Id.

<sup>18</sup> Id. at 415-16 (defining "'drill hole'" as 'a hole in coal or rock made with an augur or a drill)').

<sup>19</sup> Id. at 416.

<sup>20</sup> See 603 F. Supp. 117, 122 (D.S.D. 1984).

<sup>21</sup> Id.

<sup>22</sup> Id. (noting that witness testimony stated 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 32 (1966), 1966 U.S.C.C.A.N. 2418, 2428)).

<sup>23</sup> Id. (requiring government to disclose number, locations, and depths of proposed uranium exploration drill holes in national forest under federally approved program).