

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: SUMMIT CARBON SOLUTIONS, LLC	DOCKET NO. HLP-2021-0001
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**ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR
CONFIDENTIALITY, WITH DISSENTING OPINION**

PROCEDURAL BACKGROUND

On August 13, 2021, Summit Carbon Solutions, LLC (Summit Carbon), filed a request for confidential treatment with the Utilities Board (Board) as part of its filing in Docket No. HLP-2021-0001. In its request for confidential treatment, Summit Carbon states the information for which it seeks confidentiality are mailing lists of names to which Summit Carbon will send notices of informational meetings. The lists contain names and addresses of individuals and business entities, including corporations, limited liability companies, partnerships and trusts, and governmental entities for whom notice of the informational meetings was sent. Specifically, Summit Carbon requests confidentiality over the mailing lists filed on August 24 and September 2, 2021.

Summit Carbon states these documents qualify as reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose. Iowa Code § 22.7(6). In addition, Summit Carbon states that it seeks to protect landowners' privacy and peace of solitude until landowners choose to participate in this proceeding. Summit Carbon states any individual land record is likely a public record; however, it obtained the lists by compiling the information from multiple county

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assessors' sites. Summit Carbon states it took a substantial amount of time, money, and effort to compile the lists and required hiring an experienced vendor. Summit Carbon states that not holding the lists confidential would put both it and its vendor at a competitive disadvantage. Additionally, Summit Carbon states there is no public purpose to disclosing the lists and releasing the lists would be a public disservice. Summit Carbon states the people on the mailing lists did not volunteer to be put on the mailing lists, but rather, Summit Carbon initiated the mailing lists. Summit Carbon states that unless and until the persons on the mailing lists choose to participate, their names and contact information should not be made publicly available.

Summit Carbon also provided a sworn affidavit from Jake Ketzner, Vice President of Government and Public Affairs for Summit Carbon, affirming the documents in question contain confidential information.

On September 14, 2021, the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, filed an objection to the request for confidential treatment of the mailing lists. OCA states it disagrees with Summit Carbon's rationale for holding the documents confidential. OCA states there would be a public purpose for releasing the mailing lists because the mailing lists would allow landowners to collaborate and mount a joint response to the proposed pipeline. OCA also states it disagrees with Summit Carbon's assertion that releasing the mailing lists would cause competitive harm to it and its vendor. OCA states it does not understand how the mailing lists could give an advantage to a competitor, given Summit Carbon has already filed maps of the proposed route. OCA states it shares Summit Carbon's concern for privacy, safety, and security of landowners on the mailing lists and the Board can take

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steps to protect the privacy and security of landowners while providing meaningful public access to the mailing lists.

The Board also has received numerous objections pertaining to Summit Carbon's request for confidentiality. These objections are either mirror images of one another or touch upon the same issue. The overarching message from the objections is that the mailing lists should be made public to allow landowners to contact one another regarding the project.

On November 1, 2021, Summit Carbon filed a reply in support of its request for confidential treatment of the mailing lists. In its reply, Summit Carbon reiterates its assertion that the mailing lists should be held confidential pursuant to Iowa Code § 22.7(6). Summit Carbon states the Board has held mailing lists confidential in Docket Nos. GCU-2019-0001 and GCU-2020-0001, pursuant to Iowa Code § 22.7(6). Additionally, Summit Carbon states the mailing lists are not required pursuant to Iowa Code chapter 479B or 199 Iowa Administrative Code chapter 13, but were requested by Board staff.

Summit Carbon's reply further states that should the Board determine that confidentiality should not be granted over the mailing lists, Summit Carbon should be allowed to either withdraw and delete the filing from the Board's electronic filing system, as the mailing lists are not required by statute or rules, or refile the mailing lists. If Summit Carbon would be allowed to refile the mailing lists, it additionally proposes three limitations: 1) limit the mailing list to only those tracts on the proposed centerline; 2) have the Board run the list against the Safe At Home program database; and 3) have the Board provide an opt-in mechanism to allow landowners to declare their desire to have their contact information made public.

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BOARD DISCUSSION

Upon review of the information filed, the Board will grant in part and deny in part the request for confidential treatment filed on August 13, 2021. Iowa Code § 22.7(6) provides that reports to a governmental agency which, if released, would give advantage to competitors and serve no public purpose, may be kept confidential. The Board finds that the confidential materials detailed above do not meet the requirements of Iowa Code § 22.7(6); however, there is a privacy interest the Board must consider before reaching its ultimate decision as to the mailing lists.

The Iowa Supreme Court characterized this § 22.7(6) exception as being “narrow” and recognized that the burden of proving the elements of the exception rests with the party seeking confidentiality. *Iowa Film Prod. Servs. v. Iowa Dep’t of Economic Development*, 818 N.W.2d 207, 225, 228 (Iowa 2012). Consequently, Summit Carbon must show that permitting public inspection of the mailing lists would give its competitors an advantage and serve no public purpose. *See Northeast Council on Substance Abuse, Inc. v. Iowa Dep’t of Public Health*, 513 N.W.2d 757, 760 (Iowa 1994) (holding that to fall within the § 22.7(6) exception, the requesting party must prove that the release of the public records would give advantage to the requesting party’s competitors and would serve no public purpose).

Turning to the competitive advantage element, Summit Carbon asserts that it, by and through its vendor, spent a substantial amount of time and resources in the creation of the mailing lists. However, even assuming the assertion is accurate, neither the economic nor intrinsic value of the lists is an element of the § 22.7(6) exception. Summit Carbon does not identify who its competitors are or how access to the mailing lists, which are unique to Summit Carbon’s proposed project, would provide

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an advantage to those unspecified competitors if any exist. The Board finds Summit Carbon has not provided a legal or factual basis upon which it can be found that its competitors would receive an advantage should the mailing lists not be held in confidence. Therefore, the Board finds that Summit Carbon has not met the burden of Iowa Code § 22.7(6) for holding the mailing lists in confidence.

This finding, however, does not end the Board's analysis. In *Clymer v. City of Cedar Rapids*, the Court recognized that individuals can have a substantial privacy interest in personal information, including personal addresses, held by the government that outweighs the public's interest in disclosure of that information. 601 N.W.2d 42, 47 (Iowa 1999). Where the legislature has not specifically listed the requested information as an exemption, a balancing test may be necessary to consider these privacy interests. *American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Community School District*, 818 N.W.2d 231, 240 (Iowa 2012) (Cady, C.J., dissenting). If a public record contains personal information, which is not specifically exempted from disclosure by statute and "the disclosure of which would constitute an invasion of personal privacy, the courts will often apply general privacy principles, which examination involves a balancing of conflicting interests – the interest of the individual in privacy on the one hand against the public's need to know on the other." *Id.* at 234 (Wiggins, J., writing for the majority) (quoting Andrea G. Nadel, Annotation, *What Constitutes Personal Matters Exempt from Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act*, 26 A.L.R. 4th 666, 670 (1983)). In *DeLaMater v. Marion Civil Service Commission*, the Court stated that the use of a balancing test in construing privacy exemptions under public records laws is common and identified the following factors as being material to the test:

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- (1) The public purpose of the party requesting the information;
- (2) Whether the purpose could be accomplished without the disclosure of personal information;
- (3) The scope of the request;
- (4) Whether alternative sources for obtaining the information exist; and
- (5) The gravity of the invasion of personal privacy.

554 N.W.2d 875, 878 (Iowa 1996).

The first factor “considers the public purpose of the party requesting the information” and a “substantial purpose for the information weighs in favor of the public’s need to know.” *American Civil Liberties Union Foundation of Iowa, Inc*, 818 N.W.2d at 242 (Cady, C.J., dissenting). While several filers have claimed certain public interests that will be advanced by denying the motion for confidentiality, those public purposes are not directly related to the public interests behind Iowa’s open records law, which is to “open the door of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.” *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019). Therefore, whatever public purposes may exist in the release of the mailing list, they do not advance the public purposes underlying Iowa’s open records law.

The second factor examines whether that identified public purpose can be accomplished without the release of personal information, and the fourth factor considers the alternative sources of this information. In its filing, OCA states there would be a public purpose for releasing the mailing lists because the mailing lists would allow landowners to collaborate and mount a joint response to the proposed pipeline. Even assuming for the sake of argument that this is a valid public purpose, the Board finds the consolidation of affected landowners could be accomplished without the release of the personal information. As evidenced in several dockets that have come

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before the Board, landowners are able to coordinate and collaborate without the Board releasing personal information regarding their neighbors. Landowners can obtain the same information by speaking with their neighbors, by seeing who attends the informational meetings, and by engaging in any of the other typical outreach activities used by other such community groups. In addition, in this docket more than 400 persons have filed comments or objections to the proposed pipeline, and such comments/objections contain the filers' names and contact information either by email or mailing address.

The third factor relates to the scope of the request, which, although very large, is contained within just a few filings and, if ordered by the Board, can be readily assembled by Summit Carbon for production to requesting parties.

The final factor requires the Board to consider the gravity of the personal privacy invasion, and the Board finds this factor weighs strongly in favor of granting the confidentiality request. There is no information in this Docket suggesting that any of the 15,000 persons identified on the mailing lists requested to be on the lists or understood that such a list even exists. There is no information before the Board suggesting any person identified on the lists requested their information be provided to a state governmental agency. Nor is there any information before the Board to suggest these individuals and entities are even aware that their names and addresses have been filed in this Docket and could be released to the public at large.

In addition, with more than 400 comments and objections on file in this docket, parties who want to develop a coalition to resist the application for pipeline permit have a significant block of similarly interested persons with which to work. Given that there is substantial public interest in the proposed project, landowners and other interested

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persons who oppose the proposed pipeline are likely to know about the project and opposition to it, and can join the opposition coalition if they choose to do so.

After weighing the five factors, the Board finds the privacy interests held by individual persons identified on the mailing lists outweigh whatever public interests may be advanced through the release of the public records. The Board finds that business and governmental entities on the mailing lists do not have the same privacy expectations as the individual landowners. See, e.g., *FCC et al. v. AT&T Inc. et al.*, United States Supreme Court (Slip Opinion No. 09-1279.) The Board will therefore grant confidentiality with respect to the names and addresses of all individual persons and deny the request for confidential treatment with respect to the names and addresses of all business and governmental entities.

The Board considered alternative ways that it might release the mailing lists, while at the same time protect the privacy of people whose names are on the mailing lists and may not want to have their names released publicly. OCA and Food & Water Watch have suggested checking the names on the mailing lists against names on the Safe at Home Program list, and, in addition, contacting each of the people on the mailing lists to see if they want their names released. The Board appreciates the suggestions, but finds them to be unworkable. First, the names on the Safe at Home Program list are confidential, and the Board has no readily available way to obtain the names to compare them with the mailing lists. In addition, and more importantly, there are approximately 15,000 names on the mailing lists, approximately 3,000 of which are landowners adjacent to the proposed pipeline, with the rest being in the notice corridor. It would be extremely burdensome to send a notice to each person on the mailing lists

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to confirm whether each person wants his or her name to be publicly released and then to administer the public and confidential portions of the lists.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Request for Confidential Treatment filed by Summit Carbon Solutions, LLC, on August 13, 2021, is granted in part and denied in part. The names and addresses of all non-governmental persons contained within the mailing lists previously filed with the Board are hereby granted confidentiality. The request for confidentiality for all other information contained therein is denied.

2. The information granted confidential treatment shall be held confidential by the Utilities Board subject to the provisions of 199 Iowa Administrative Code 1.9(8)(b)(3).

3. Summit Carbon Solutions, LLC, shall file within 20 days of this order the mailing lists, redacting the names and addresses of all individuals, while leaving all addresses and names of all business and governmental entities public.

UTILITIES BOARD

Richard Lozier Date: 2021.11.23
12:40:48 -06'00'

ATTEST:

Louis Vander Streek
Louis Vander Streek
2021.11.23 14:30:45
-06'00'

Josh Byrnes Date: 2021.11.23
11:52:16 -06'00'

Dated at Des Moines, Iowa, this 23rd day of November, 2021.

DISSENTING OPINION

I respectfully dissent from the majority's decision. I would find the 31 mailing lists (collectively, the mailing list) to be a public record for which Summit Carbon Solutions, LLC (Summit Carbon), failed to demonstrate a legal basis for withholding the information contained from public inspection. I would deny Summit Carbon's request to the extent it seeks to hold confidential the names and addresses of the governmental and corporate/commercial entities and the mailing addresses of the real persons.

Beginning on August 24, 2021, and at the request of Utilities Board (Board) staff, Summit Carbon filed, and has continued to file, county mailing lists. Each county mailing list aids the Board in its review of the docket in several respects. The county lists provide additional information from which the Board can determine whether proper informational meeting notice was provided as required by statute and rule. The county mailing lists also aid the Board and Board staff in determining whether a conflict of interest exists that may disqualify their further participation in the case. In this case, each county mailing list is comprised of all property owners to whom Summit Carbon sent notice of the informational meeting held in that county. Each entry on the mailing list identifies the owner of a property and the owner's mailing address. Where a parcel of property is owned by several persons or entities, each owner is identified with that owner's mailing address. The identified owners include real individuals, corporate and commercial entities, and governmental entities. For example, for the Story County mailing list, the first three entries appear to identify properties owned by an ethanol producing plant, the City of Nevada, and a farmers cooperative.

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Summit Carbon's request for confidentiality was made under the procedures set forth in 199 Iowa Administrative Code rule 1.9(6), which provides that a person submitting information or material to the Board may submit a request to hold all or part of the information or material from public inspection. Pursuant to paragraph 1.9(6)(b), such a request must include the "legal basis for withholding the materials from inspection and the facts to support the legal basis relief upon." Under the Board's public information and inspection of records rules, if a request for confidentiality is granted, the Board will not include the material in the Board's publicly accessible electronic filing system. Should an open records request be made for the material, the Board will notify the party requesting confidentiality of the open records request and withhold the materials from public inspection for 14 days to allow the party requesting confidentiality an opportunity to seek injunctive relief.

In its August 13, 2021 request, Summit Carbon contends the mailing list should be withheld from public inspection under § 22.7(6), which provides that a governmental body may hold a public record in confidence if the record constitutes a report to a governmental agency "which, if released, would give advantage to competitors and serve no public purpose." Similarly, in its November 1, 2021 reply, Summit Carbon cited no authority or legal basis supporting its request other than § 22.7(6).

I agree with the majority that Summit Carbon failed to demonstrate the mailing list falls within the § 22.7(6) exemption. In addition to failing to show that the release of the mailing list would provide an "advantage to competitors," as the majority found, I would also find that Summit Carbon failed to meet its burden in proving that no public purpose could result from its release.

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In its August 13, 2021 request, Summit Carbon does not address the “public purpose” element and, instead, focuses on what it believes to be the privacy interests of the landowners identified in the mailing lists. Similarly, in its November 1, 2021 filing, Summit Carbon asserts that whatever public interest may exist in the release of the mailing lists “does not outweigh the privacy interests of the landowners on the mailing lists.” However, the Supreme Court has held that it is not the role of an adjudicator to weigh the competing policy interests in applying the § 22.7(6) exemption. *Northeast Council on Substance Abuse, Inc. v. Iowa Dep’t of Public Health*, 513 N.W.2d 757, 761 (Iowa 1994). On this point, the Court held:

We repeat that it is not our responsibility to balance competing policy interests. This balancing is a legislative function and our role is simply to determine the legislature’s intent about those policy issues. In this instance, the legislature has drawn the exception to confidentiality narrowly by requiring a showing that no public purpose is served by public disclosure. So we construe section 22.7 narrowly.

Id.

The legislature delegated to the Office of Consumer Advocate (OCA) a unique role in Board proceedings. Through Iowa Code § 475A.2(2), the legislature directed OCA to act as an attorney for all customers and the public in matters before the Board. As pertinent to this issue, OCA “strongly disagree[d]” with Summit Carbon’s assertion that no public purpose would be served by public disclosure of the mailing lists. OCA observed that releasing the mailing lists could assist in public collaboration and may result in a more complete and meaningful contested case record. The fact that OCA serves as the attorney for all customers and the public in general and has identified public purposes that could be served through the release of the mailing list is meaningful to my review.

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Therefore, while agreeing with the majority that Summit Carbon failed to prove that the release of the mailing list would give advantages to competitors, I also believe that Summit Carbon failed to demonstrate that the release of the mailing list would serve no public purpose.

Finding that Summit Carbon failed to demonstrate the mailing list meets the § 22.7(6) exemption, the majority next considers whether the mailing list should be held in confidence based on the privacy interests held by the property owners identified in the mailing list. After analyzing five factors, the majority finds that the privacy interests held by individuals and commercial and corporate entities outweighs the public interests in the release of that information. I believe this conclusion is in error.

First, the majority fails to identify any authority, and I have been unable to locate any Iowa authority, holding that non-individuals have privacy interests that can justify the withholding of public records from public inspection. On this point, it is certainly worth noting that in *FCC v. AT&T*, 562 U.S. 397 (2011), the United States Supreme Court held that “personal privacy” for purposes of the federal Freedom of Information Act does not include corporate entities.

Second, the information contained in the mailing list is already publicly available, albeit not in the compiled form of the mailing list. Summit Carbon located the name and address for each property owner from data that is already publicly available on each county assessor’s website. Consequently, this is not a situation in which the information contained in the mailing list is otherwise secreted from the public.

For these reasons, I would deny Summit Carbon’s motion to the extent the

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information identifies the names and mailing addresses of all corporate/business and governmental property owners.

With respect to individual property owners, I do appreciate the majority's concern that these persons may have privacy interests at stake and may be entirely unaware that their names are included on the mailing list that was filed with this Board. Without knowing their information has been filed with the Board and that the information may be available for public inspection in the Board's electronic filing system, it seems unlikely these individuals would have an opportunity to exercise their rights under § 22.8. I also believe the public purpose advanced from the release of the information may be accomplished through the release of the mailing addresses alone. Therefore, because I believe governmental agencies are duty-bound under Iowa's open records law to release as much information as possible, I would grant Summit Carbon's motion only with respect to the individual property owners' names and would deny the motion as it pertains to the individual property owners' mailing addresses.

Geri Huser Date: 2021.11.23
13:07:55 -06'00'
