



## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

PUBLIC AFFAIRS

May 30, 2008

In reply refer to: DK-7

Mr. Dan Seligman  
Attorney at Law  
PO Box 99249  
Seattle, WA 98139

RE: Partial response to FOIA 08-039

Dear Mr. Seligman:

This is a partial response to your March 31, 2008, Freedom of Information Act (FOIA) request. This letter only addresses your request for copies of:

“Calendars . . . for three BPA employees for the years 2001-2003: Mark Reynolds; Mark Wilczewski; and Chuck Meyer.”

There are no responsive documents for Mark Reynolds. The only responsive documents that Bonneville Power Administration (BPA) has for Chuck Meyer and Mark Wilczewski are paper copies of their respective electronic calendars. These paper documents exist only because BPA preserved them in connection with the Jane Selby criminal proceedings.

### A. What is an “Agency Record?”

FOIA’s disclosure requirements apply to “agency records,” but the statute does not define that term. To determine whether the requested calendars are BPA agency records (as opposed to personal records), I considered the following factors:

1. the intent of the creator of the document to retain or relinquish control over it;
2. the ability of BPA to use and dispose of the document as it sees fit;
3. the extent to which BPA personnel read or relied on the document; and
4. the degree to which the document was integrated into BPA’s record system or files.

I used these factors to evaluate the “totality of the circumstances” in deciding whether the calendars are agency records.<sup>1</sup>

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<sup>1</sup> See e.g. Bloomberg L.P. v. US Securities and Exchange Commission, 357 F Supp 2d 156, 163 (D DC 2004) citing Tax Analysts v US Department of Justice, 845 F2d 1060, 1069 (DC Cir. 1988) and Bureau of Nat’l Affairs, Inc. v US Department of Justice, 742 F2d 1484, 1489-90 (DC Cir. 1984).

Due to the size of the responsive documents they can not be posted on the web. Please contact the BPA Freedom of Information Office at 503-230-7305 to obtain a copy.

## B. Use of Electronic Calendars at BPA

In examining each of the respective factors, the following facts are relevant:

1. Mr. Meyer kept his electronic calendar to track both business and many personal appointments. His calendar also contained other personal information such as birthdays. Only Mr. Meyer and his assistant made entries on his electronic calendar. His subordinates had access to his calendar to know where he was and when he was available. Mr. Wilczewski also kept track of both business and personal appointments on his electronic calendar. Only he and his secretary had access to his calendar.

Although both electronic calendars were created with government resources on government time, BPA never exercised institutional control over them. Thus, based on the actual use of the calendars, and although they show business appointments, overall this factor points to the calendars being personal records, created and used for personal convenience.

2. Mr. Meyer and Mr. Wilczewski maintained their calendars electronically on BPA's Microsoft Outlook system. As noted, however, neither the BPA computer administrator nor the BPA records custodian took control of the calendars. The extent of each employee's individual control over their own electronic calendars is made clearer by the unique circumstances leading up to BPA's possession of the requested calendars—BPA preserved them only in response to a specific discovery request in a criminal case. Without that request, the calendars could have been deleted at the discretion of either Mr. Meyer or Mr. Wilczewski. This factor points to the calendars being personal records.

3. At least for Mr. Meyer, although his staff had access to his electronic calendar to determine his meeting schedule and plans for a particular day, only he and his personal assistant made entries on the calendar. And as noted, the calendar contained many personal appointments and notes intertwined with the appointments that were within the scope of his official duties.

In addition, as far as can be ascertained from the paper copies of the calendars, there is no substantive agency related information contained in them—only the fact of a particular appointment. Thus, although some BPA employees may have relied on Mr. Meyer's electronic calendar to ascertain his availability, the calendars do not appear to have been circulated, used, or kept as daily agendas. That is, employees did not rely on or use the calendars to conduct agency businesses. This factor points to the calendars being personal records.

4. BPA does not require its employees keep their calendars as agency records. There is no BPA records retention schedule that applies to calendars, whether in hard copy or electronic form. Although National Archives and Records Administration's general records schedule (GRS 23) addresses calendars, BPA has determined that these documents are non-records under the Federal Records Act (FRA). As with the other factors considered here, this fact alone is not dispositive, since what is an "agency record" under FOIA is often broader in scope than the

statutory agency record keeping requirements of the FRA.<sup>2</sup> Nonetheless, this factor points to the calendars being personal records.

### C. Conclusion

It is BPA's burden to establish that documents in its possession are not agency records subject to FOIA. In weighing all of the above factors in the context of the particular facts here, under the totality of the circumstances test, I find that the calendars are not agency records. They are the personal records of Mr. Meyer and Wilczewski. The calendars are therefore not subject to disclosure under FOIA. I find ample support in the case law for this conclusion.

Bureau of Nat'l Affairs v US Department of Justice<sup>3</sup> is the starting point, and the most instructive case, for determining whether a document is an agency record under FOIA when a Federal employee created the record "at least in part to enable him or her to conduct agency business." One of the issues in BNA was whether the requested appointment calendars were agency records under FOIA. As here, the calendars in BNA were prepared on government time using government materials. Also, again like here, the calendars were not placed into the agency's files; the government employees were allowed to dispose of these "non-record materials" at the employee's discretion—meaning the agency had not sought to exercise institutional control over the calendars (although the agency could have). Finally, and as here, staff had some access to the calendars to determine the officials' availability.<sup>4</sup>

The court concluded that the appointment calendars were not agency records. The calendars were not distributed to employees, but were for the convenience of the officials to organize their personal and business appointments. In fact, the inclusion of personal information in the calendars was relevant to show the personal nature of the calendars. FOIA did not reach "such personalized documents absent some showing that the agency itself exercised control over or possession of the documents."<sup>5</sup>

A more recent case, involving a FOIA request for the electronic calendars of the SEC Chairman, had the same outcome. In Bloomberg L.P. v. US Securities and Exchange Commission,<sup>6</sup> the Chairman's calendar, maintained on the agency's computer system, contained professional and agency meetings, as well as numerous personal, social, and medical appointments. Only the Chairman and his assistant placed entries on the calendar; others on his staff could view the calendar to determine the Chairman's availability, but the calendar itself was not circulated.

The court held that the electronic calendar was a personal record. The Chairman created and used the electronic calendar for his personal use. It was not an "official record" of his schedule,

<sup>2</sup> BNA, 742 F2d at 1493.

<sup>3</sup> BNA, 742 F2d at 1491.

<sup>4</sup> BNA, 742 F2d at 1494-1495. Note that the court referenced the same General Records Schedule 23 discussed above.

<sup>5</sup> BNA, 742 F2d at 1496 (emphasis added).

<sup>6</sup> 357 F Supp 2d 156, 163-164 (D DC 2004).

despite the fact that it contained both personal and business appointments. Finally, since the calendar was not integrated into the SEC's record system, this reinforced the conclusion that it was a personal record, not subject to FOIA.<sup>7</sup>

In contrast is the case of Consumer Federation of America v. Department of Agriculture.<sup>8</sup> There, the electronic calendars were agency records for a number of reasons that are inapplicable here (but which emphasizes the fact specific, totality of circumstances analysis that is required). First, the court could not determine if the employees were free to dispose of their calendars as they saw fit. Second, it was unclear whether the calendars were a part of the USDA's agency files. Third, the calendars were electronically "distributed" to listed recipients, and were relied on by others to facilitate the day-to-day operations of the agency.<sup>9</sup>

For the reasons above, your FOIA request for the calendars is denied.

If dissatisfied with this determination, you may make an appeal within thirty (30) days of receipt of this letter to Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW, Washington, D.C. 20585. Both the envelope and the letter must be clearly marked "Freedom of Information Act Appeal."

Sincerely,

*/s/ Christina J. Brannon*

Christina J. Brannon  
Freedom of Information Act/Privacy Act Officer

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<sup>7</sup> Id. at 164. The one DOE OHA opinion that BPA located on whether appointment calendars were agency records also came to the same conclusion. See In re Charles Frazier, No. VFA-0261 (1/28/98).

<sup>8</sup> 455 F3d 283 (DC Cir 2006).

<sup>9</sup> Id. at 289-293.

## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

PUBLIC AFFAIRS

June 20, 2008

In reply refer to: DK-7

Mr. Dan Seligman  
Attorney at Law  
P.O. Box 99249  
Seattle, WA 98139

RE: FOIA 08-039

Dear Mr. Seligman:

This is a final response to your March 31, 2008, Freedom of Information Act (FOIA) request that you made to the Bonneville Power Administration (BPA). BPA's partial response to you on May 30, 2008, addressed Item 1. This letter addresses Items 2 thru 8 and is as follows:

2. Final reports relating to the following internal audits/reviews:
  - a) Scheduling Automation Vulnerability Study - provided in its entirety [see item 8 in the subpoena]
  - b) Softsmith Inc Contract Review – provided in its entirety
  - c) Broad Agency Review of Contracting (Procurement) Process –  
No document was produced in response to the subpoena, and the Agency is unable to locate any such document today.
3. Any and all deposition transcripts and/or witness statements arising out of the dispute between Knowmadic and BPA regarding invoices, including any depositions or statements taken in Case No. EBCA No. C0308369 before the Department of Energy:

There are three deposition transcripts that are responsive to the request for depositions or witness statements arising out of the dispute between Knowmadic and BPA regarding invoices. In particular, BPA identified pages from each of the three depositions in which the invoices between Knowmadic and BPA are discussed. BPA is not asserting Exemption 5 for those pages, although in some instances it could. However, BPA is withholding the identified pages under Exemption 6.

The employees who had their depositions taken have a privacy interest in not having their individual decisions, thoughts, and actions made publicly available. The release of this information could subject the employees to unnecessary embarrassment and harassment. In contrast, there is little or no public interest in this information. The identified pages from the

transcripts add little, if anything, to the public's understanding of the agency's actions. In fact, BPA's handling and oversight of the Knowmadic contract was subject to an IG investigation, the results of which have been released to the public. In balancing the substantial privacy interests of the employees against no articulated public interest in this specific information, Exemption 6 mandates that the information not be released.

In addition, BPA tried to redact the names and other identifiable information (e.g. actions that would be attributable to an individual employee) from the deposition pages in an attempt to release other responsive information. This was impossible to do without compromising the identity of the employees and their actions. Therefore, the identified pages from the three transcripts are withheld in their entirety.

4. Documents showing the TM IT Expense and Capital Budgets and Actuals spent for 1999 – 2003. [see item 21 in the subpoena]

Documents showing TM IT expense and capital budget and actuals for 2000, 2001, 2002, and 2003 are enclosed. Also enclosed is a capital and a detail report that shows project level descriptions. No information for 1999 was provided in response to the subpoena due to the fact that BPA had converted to the BES system in 2000, and the data for 1999 was not readily accessible. The data for 1999 is still not accessible.

5. BFTE allocated for TM IT Projects for 1999-2003 [see item 22 in the subpoena] AND 6. CFTE on board for TM IT projects for 1999-2003. [see item 23 in the subpoena]

The following was provided in response to the subpoena, and we are providing you with the same documents:

The Transmission Business Line (TBL) FY 2000 and FY 2001 Position Management –FTE Report,

Transmission Marketing & Sales BFTE and CFTE count which was taken at the end of each fiscal year.

BPA was unable to determine how many of the TM employees were assigned to information technology (IT) projects, and therefore did and cannot provide any further information.

7. The following audit reports:

IG Audit on Scheduling Automation (2003)  
 IG Audit on Agency IT (2002)  
 IG Audit on Agency Contracting (2003/2004)  
 IG Audit on "Memo Accounts" (2005)

[see item 24 in the subpoena]

The Agency provided three IG Audits in response to the subpoena; Scheduling Automation, Agency IT, and “Memo Accounts.” The Agency was unable to locate a report on Agency Contracting on DOE’s IG website. Copies of the three IG Audits are provided.

8. Position description of BPA’s ethics officer in effect during 2002-2003.  
[see item 31a in the subpoena]

In response to the subpoena, the Agency informed Mr. Olson that BPA does not have an employee whose position title is Ethics Officer. Enclosed are the documents that were provided in response to the subpoena.

If you are dissatisfied with this determination, you may make an appeal within thirty (30) days of receipt of this letter to Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW, Washington, D.C. 20585. Both the envelope and the letter must be clearly marked “Freedom of Information Act Appeal.” There is no charge for your request.

I appreciate the opportunity to assist you with this matter. If you have any questions regarding this correspondence, you may contact Laura M. Atterbury, FOIA/Privacy Act Specialist at 503-230-7305.

Sincerely,

Christina J. Brannon  
Freedom of Information Act/Privacy Act Officer

Enclosures