Department of Energy

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

PUBLIC AFFAIRS

February 7, 2011

In reply refer to: DK-7

Mr. Jonathan K. Donehower
General Counsel
IUOE Local 701
555 E First Street
Gladstone, OR 97207

RE: FOIA 2010-01849-F

Dear Mr. Donehower:

This is Bonneville Power Administration's (BPA) final response to your request for agency records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. You originally submitted a July 30, 2010, FOIA request to the Corps of Engineers for:

> ". . . all contracts, bids and any other agreements signed by either William Charles Construction Company LLC, or William Charles West for the construction of the Lyle Falls and Castile Falls Fishway Improvements Project in Washington State."

The COE transferred your FOIA request to BPA on August 4, 2010.

A. Responsive records and comments by submitters

BPA located responsive records to the FOIA request, including an AIA Standard Form Agreement between the Owner (Yakama Nation) and the Contractor (West) for the Lyle Falls Fishing Improvement; an "Additive item" for the Castile Falls Fishway; bid form and base bid from the contractor; and subcontract and responsibility forms from the contractor.

As required by Executive Order 12,600, BPA solicited comments from both the Yakama Nation and West as to whether they had objections to the release of the responsive records pursuant to Exemption 4 of FOIA. The Yakama Nation objected to the release of the Agreement or of any of the other responsive records, while West had objections to the release of specific portions of the records.

B. Exemption 4 Analysis

Under Exemption 4 of FOIA, records may be exempt from disclosure if they are "commercial" in nature, are "obtained [by BPA] from a person,"[1] and are "privileged or confidential." Here, there is no question that the responsive records are commercial in nature, and that BPA obtained them from a person--either the Yakama Nation or West.[2]

Consequently, BPA only must determine whether the information is confidential in nature. To do so, the initial question is whether BPA obtained the records voluntarily or involuntarily, as those terms are used under Exemption 4.[3] If voluntarily obtained, the records are withheld without further analysis if the submitters would not customarily make those records or information available to the public. If involuntarily obtained, on the other hand, the records or information are confidential only if their release would likely cause substantial competitive harm to one or both of the submitters.[4]

1. Were the responsive records provided voluntarily?

As noted above, BPA is not a party to the Agreement for the two fishways. The Agreement is a bilateral contract between the Yakama Nation and West. BPA, through a separate contract with the Yakama Nation, provides funds to the Tribe. In this contract,[5] BPA requires the Yakama Nation to provide BPA with specific, identified information so that BPA can monitor, and if necessary audit, the Agreement.

Examples of information that BPA requires under the Yakama Nation-BPA contract include daily construction logs and monthly construction progress updates. The contract does not require the Yakama Nation to provide BPA with the information that is contained within the responsive records to this FOIA request. Likewise, BPA's Bonneville Purchase Instructions (BPI) does not require the Yakama Nation to provide BPA with the information in the responsive records.[6] The BPA Contracting Officer (CO), and the Contracting Officer's Representative (COR), respectively, have confirmed this conclusion—that the Yakama Nation has never been required, and is not required, to provide BPA with these particular records.

Thus, under Exemption 4, BPA obtained the responsive records voluntarily because neither the Yakama Nation-BPA contract, nor the BPI, required them.

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[1] It is unclear whether BPA obtained the responsive records directly from the Yakama Nation (or West), or indirectly through BPA's Pisces database. Either way, the requirement of "obtained from a person" is satisfied. See 28 CFR 16.8(a)(2) (DOJ FOIA regulations defining a submitter as "any person or entity from whom [DOJ] obtains business information, directly or indirectly").

[2] For ease of reference, BPA refers to the Yakama Nation and West collectively as the submitters.

[3] Critical Mass Energy Project v NRC, 975 F2d 871, 879 (DC Cir 1992).

[4] See National Parks & Conservation Ass'n v. Morton, 498 F2d 765, 770 (DC Cir 1974).

[5] The contract between the Yakama Nation and BPA is IGC (Intergovernmental Contract) 42840.

[6] BPI Contract Clause 25-50, incorporated by reference into the Yakama Nation-BPA contract, requires a contractor to provide certain specified information to document items in a cost reimbursement contract. A copy of the sub-contract (in this instance the Agreement), is not required.

The case law supports this conclusion. One example that parallels this situation is Parker v. Bureau of Land Management.[7] In Parker, the BLM received documents from two pipeline companies in response to proposed pipeline projects. Of importance to the analysis here, the BLM right-of-way application regulations did not require this information. Instead, the documents and information were submitted to assist the BLM in considering and processing the proposals. Since the agency did not require this specific information, the court concluded that the documents that were submitted were done so voluntarily.[8]

2. Are the responsive records customarily made available to the public?

Because BPA obtained the responsive records voluntarily, the only remaining question is whether they (or the information in them), are customarily made available to the public. It is the actual customary treatment of the information by the submitters that is important, not industry custom. That is, a submitter may have made some disclosures of the information, but as long as they were not public, the information is protected.[9]

Although not done so directly in the context of a "voluntarily submitted" analysis under Exemption 4, at least one of the submitters, the Yakama Nation, has shown that the information in the responsive records is not customarily made available to the public. As the Yakama Nation stated, it does not have "a public disclosure ordinance or other law allowing for disclosure of documents generated through tribal procurement processes." In addition, both BPA's CO and COR confirmed that they are not aware of this information being made customarily available to the public.

These facts provide an adequate basis to support the conclusion that the responsive records are not made generally available to the public.[10]

C. Conclusion

BPA obtained the responsive records voluntarily, and they are not otherwise made publicly available. The responsive records will be withheld in their entirety under the Exemption 4 "voluntary" standard. Therefore, there is no need for BPA to determine whether the release of the responsive records would likely cause either the Yakama Nation or West substantial competitive harm.

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[7] 141 F Supp 2d 71 (DDC 2001).

[8] 141 F Supp 2d at 77-78. See also Mallinckrodt v. West, 140 F Supp 2d 1, 5-6 (D DC 2000) (discussing the "voluntary" nature of information regarding rebates under Exemption 4, and distinguishing it from pricing information).

[9] Critical Mass, supra 975 F.2d at 879-880.

[10] The fact that the Yakama Nation posted the Agreement on BPA's Pisces does not change this conclusion. The website is not open to the general public, only to BPA and its Fish and Wildlife Program contractors. Even within that small group, a contractor's access to information other than its own is limited. Here, for example, other contractors can only see "Contacts" information (i.e. who to contact at BPA or the Yakama Nation), but not any of the Agreement itself.

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

Please contact Laura M. Atterbury, FOIA/Privacy Act Specialist, at (503) 230-7305 with any questions regarding this letter.

Sincerely,

/s/ Christina J. Munro

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

cc:Yakama Nation
William Charles Construction Company