



**Department of Energy**

Washington, DC 20585

**JUL 24 2002**

MEMORANDUM FOR: Gene Tollefson  
FOI Officer  
Bonneville Power Administration

FROM: Steven L. Fine *A. L. Fine*  
Staff Attorney  
Office of Hearings and Appeals

RE: FOIA Appeal filed by Lon L. Peters  
Case No. VFA-0756

Attached is a copy of a Decision and Order recently issued to Lon L. Peters by the Office of Hearings and Appeals. As set forth in the Decision and Order, the DOE has determined that this Appeal shall be granted and remanded to your office.

If you have any questions concerning this memorandum, please contact me at (202) 287-1449, or at my internet address: [steven.fine@hq.doe.gov](mailto:steven.fine@hq.doe.gov).

Attachment

CC: Abel Lopez  
Director, FOIA and Privacy Act Group  
MA-73





Department of Energy  
Washington, DC 20585  
**JUL 24 2002**  
DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

**Appeal**

Name of Appellant: Lon L. Peters  
Date of Filing: June 24, 2002  
Case Number: VFA-0756

On June 24, 2002, Lon L. Peters (the Appellant) filed an Appeal from a final determination issued on May 22, 2002, by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA responded to a Request for Information filed on February 18, 2002, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. BPA's determination released several responsive documents to the Appellant. This Appeal, if granted, would require BPA to release additional information to the Appellant.

**I. BACKGROUND**

On March 21, 2001, the Appellant filed a request for information with BPA seeking

... copies of all executed contracts entered into by [BPA] that have been, are or will be included in the calculation of 'Augmentation Pre-Purchase Costs' (as exemplified on line 1 of Table 4 in the LB-CRAC workshop handout distributed by BPA on February 14, 2002, attached), for the period from October 1, 2001 through September 30, 2006.

Determination Letter at 1 (quoting Appellant's March 21, 2001 request for information). On May 22, 2001, BPA issued a determination letter (the Determination Letter) indicating that it was releasing several responsive documents to the Appellant. However, six of the documents released by the Determination Letter were released in redacted form. These six documents were described in the Determination letter as "agreements between BPA and Direct Service Industry customers." The information that was redacted from these six documents was described in the Determination Letter as "tables . . . that display the customer's unique financial information," "price and revenue information," "transaction details (months, demand limit, hours price etc.)," "proprietary financial information," "a diurnal power amount table," and "power amounts and rates." BPA provided the following justification for these withholdings:

These Direct Service Industry customers consider this information to be business sensitive. BPA has withheld this information pursuant to 5 U.S.C. § 552(b)(4) (Exemption 4 of the FOIA). This commercial information is confidential. All Direct Service Industry customers have requested BPA to redact and withhold from public disclosure such information. The release of this information would provide the



competitors of each Direct Service Industry customer with information not otherwise publicly available concerning each customer's operating plans. This information is commercially sensitive and if released, could cause significant competitive harm to the customer. In addition this information has been traditionally protected from disclosure under the FOIA by BPA.

Determination Letter at 2. On June 24, 2002, the Appellant submitted the present Appeal in which it challenges the adequacy of BPA's withholding determinations. Specifically, the Appellant contends:

BPA has redacted the price charged for power under certain contracts where BPA sells power to direct service industry customers, the amount of power provided under certain contracts, and when it will sell power under certain contracts. While this may be information arrived at through negotiations with a person outside the government, the information was not 'obtained' from a person outside the government but was in fact developed by the government. It is not private confidential information but government information. Therefore it is not exempt from disclosure under 5 U.S.C. § 552(b)(4).

Appeal at 2.

## II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9<sup>th</sup> Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*).

If, as in the present case, the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is

well settled that any information relating to business or trade meets this criterion. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997) (appeal pending). The Court of Appeals for the Second Circuit has specifically held that the term "commercial," as used in the FOIA, includes anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). The information at issue in the present case is clearly commercial and financial in nature.

Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). The term "person" in the context of Exemption 4 applies to a wide range of entities, including corporations, associations and public or private organizations. *See, e.g., Allnet Communication Services, Inc. v. Federal Communications Commission*, 800 F. Supp. 984, 988 (D.D.C.1992), *aff'd*, No. 92-5351 (D.C. Cir. May 27, 1994). The only type of entity that is not considered a "person" under Exemption 4 is an agency of the federal government. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360, 99 S. Ct. 2800 (1979).

In the present case, the Appellant contends that some of the information withheld by BPA was not "obtained from a person" since it was created as a result of negotiations between BPA and direct service industry customers. The Appellant is correct in concluding that the withheld information was created as a result of negotiations between BPA and its direct service industry customers. However, the fact that the information was created in such a fashion does not preclude a conclusion that it was "obtained from a person." Under the FOIA, information contained within an agency record is either "inter- or intra-agency" or "obtained from a person." In some circumstances, it is not readily apparent which of these two categories a particular item of information belongs in. This difficulty arises because some information, such as the information at issue in the present case, is obtained or created through collaboration or interaction between the government and outside entities. Accordingly, in order to determine whether information was "obtained from a person" in the context of an Exemption 4 analysis it is useful to consider whether such information meets Exemption 5's inter- or intra- agency threshold.

In a recent Exemption 5 case, the United States Supreme Court articulated a new test for determining whether communications between an outside entity and a government agency could be considered inter- or intra-agency in nature. In *Department of Interior v. Klamath Water Users*, 121 S. Ct. 1060, 1065 (2001) (*Klamath*), the Court found that some records created or obtained by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel. In such instances, the Court found that the information was intra- or inter- agency in nature. The Court explained:

[T]he fact about the consultant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

*Id.*, 121 S. Ct. at 1066-67. Conversely, the Court in *Klamath* found that communications between an agency and an outside entity that was not acting as an objective outside consultant are clearly not inter-

agency or intra-agency documents. *Id.*, 121 S. Ct. at 1067-69. Application of the *Klamath* test to the present case, reveals that the information at issue cannot be considered "inter-agency or intra-agency" communications pursuant to Exemption 5. It is the product of communications that occurred between BPA and outside parties (the direct service industries) that were clearly not acting as objective outside consultants, since at the time they were negotiating with BPA in efforts to obtain the most favorable business arrangements possible. Since the withheld information cannot be considered to be intra- or inter-agency in nature, we find that it was, for the purposes of the FOIA, "obtained from a person." Such a determination is in accord with our previous determinations in which we have concluded that information created or obtained as a result of negotiations between an agency and an outside entity is "obtained from a person" for Exemption 4 purposes. *See, e.g., B.P. Exploration, Inc.*, 27 DOE ¶ 80,216 at 80,797 (1999); *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999).

Finally, in order to determine whether information of this type can be withheld under Exemption 4, an agency must consider whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must determine that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Once an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, BPA's conclusory Exemption 4 determinations do not meet the requirements set forth above. In order to meet the requirements set forth above, BPA needs to provide both a more thorough description of the information it is withholding as well as an explanation of the reasoning underlying

its conclusion that release of this information could reasonably be expected to cause its direct service industry customers substantial competitive harm.

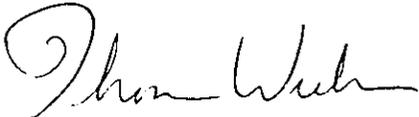
Accordingly, we shall remand this Appeal to BPA for a more thorough justification of its withholdings. On remand, BPA must then either release the information it has withheld or issue a new determination letter providing a detailed justification showing that it has applied the Exemption 4 analysis set forth above and the results of this analysis.

It Is Therefore Ordered That:

(1) The Appeal filed by Lon L. Peters, Case No. VFA-0756, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Bonneville Power Administration, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.



For  
George B. Breznay  
Director  
Office of Hearings and Appeals

Date: **JUL 24 2002**