

**May 1 2007**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Business Week Magazine

Date of Filing: March 21, 2007

Case Number: TFA-0197

This Decision concerns an Appeal that Business Week Magazine (Business Week) filed in response to a determination that was issued to it by the Department of Energy's (DOE) Western Area Power Administration (Western). In that determination, Western replied to a request for documents that Business Week submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Western released certain documents to Business Week in their entirety, but withheld a portion of one document. This Appeal, if granted, would require that Western release the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1)-(9); see also 10 C.F.R. § 1004.10(b)(1)-(9).

In its FOIA request, Business Week sought access to all contracts for Renewable Energy Certificates (RECs) procured by Western on behalf of government agencies on or after January 1, 2002.<sup>1</sup> In its response, Western provided copies of all of these contracts in their entirety except one, from which pricing information was deleted. Western cited FOIA Exemption 4 as its justification for withholding the pricing information. 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).

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<sup>1</sup>/ RECs are commodities that represent the environmental attributes of the power produced by renewable energy sources such as solar, geothermal or wind power. These Certificates can be used by certain energy purchasers to satisfy legislative or regulatory requirements that a percentage of their energy purchases come from suppliers of renewable energy.

Western's determination letter did not, however, adequately explain the manner in which it applied this Exemption.<sup>2</sup> In order to obtain this explanation, we contacted Western. We were informed that Western withheld the pricing information at the request of another federal entity on the ground that revealing the price at which that entity was purchasing RECs could put it at a disadvantage in future negotiations. *See* Memorandum of April 20, 2007 telephone conversation between Penny Casey, Western, and Robert Palmer, OHA Staff Attorney. In its Appeal, Business Week contests Western's application of this Exemption.

As previously stated, Exemption 4 shields from mandatory disclosure information that is "obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). The federal courts have held that the term "person" includes a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations. *See, e.g., Stone v. Export-Import Bank*, 552 F.2d 132, 137 (5<sup>th</sup> Cir. 1977); *Nadler v. FDIC*, 92 F.2d 93, 95 (2<sup>nd</sup> Cir. 1996) (*Nadler*). *See also Myers, Bigel, Sibley & Sajovec*, 27 DOE ¶ 80,225 (August 31, 1999) (Case No. VFA-0517). This Exemption serves to protect submitters of commercial or financial information to the federal government from the adverse effects of unwarranted public disclosure of that information, and it correspondingly provides the federal government with an assurance that such information will be reliable. However, federal entities themselves are not "persons" for purposes of Exemption 4, and any commercial information of the federal government is not shielded from mandatory disclosure by this Exemption. *See, e.g., Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 404; *Nadler v. FDIC*, 92 F.3d 93, 95 (2<sup>d</sup> Cir. 1996) (term "person" includes "an individual, partnership, corporation, association, or public or private organization *other than an agency*" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (2000)) (italics added)).

We therefore conclude that Western incorrectly applied Exemption 4 in withholding the pricing information. Consequently, we will remand this matter to Western. On remand, Western should issue a new determination letter either releasing the information to Business Week or providing a new justification for withholding it. Any such justification must include a complete explanation of how the FOIA Exemption cited was applied by Western.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Business Week Magazine, OHA Case Number TFA-0197, is hereby granted as set forth in paragraph (2) below.

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<sup>2/</sup> Within the context of this case, an adequate explanation would have included the identity of the party whose interests Western was seeking to protect, and whether the information withheld was "privileged" or "confidential." *See, e.g., BP Exploration, Inc.*, 27 DOE ¶ 80,197 (April 8, 1999) (Case No. VFA-0482). All OHA FOIA decisions may be accessed at <http://www.oha.doe.gov/foia1.asp>.

(2) This matter is hereby remanded to the Western Area Power Administration. On remand, Western shall issue a new determination letter either releasing the withheld information or providing a new and adequate explanation for withholding it.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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.

William M. Schwartz  
Senior FOIA Official  
Office of Hearings and Appeals

Date: May 1, 2007

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