



## HOW TRANSPARENT IS BPA?



Go to the web site of the Bonneville Power Administration and you can find glossy reports describing its duties as a federal power marketing agency. BPA even has publications for kids describing how dams work and salmon spawn.<sup>1</sup>

### Want To Know More?

Under the Freedom of Information Act ("FOIA"), you can request that BPA release federal records on a particular subject. Ask BPA for something routine and BPA readily complies. Part of BPA's web site contains FOIA requests and responses going back four years.<sup>2</sup>

But ask for something that goes to the heart of BPA's business transactions or that inquires into the political operations of the agency, and you will see a different BPA, an agency that stymies requests and sometimes even ignores federal regulations.

In one recent case, **BPA Watch** requested a copy of the passenger manifest of the BPA plane used to transport staff around the region. We wanted to know who rode on the plane, where and why. BPA sought to block the information, claiming a "privacy" exemption for everyone other than BPA Administrator Stephen Wright. **BPA Watch** successfully appealed to the U.S. Department of Energy's Office of Hearings and Appeals, which ordered BPA to release the materials.

In another case, BPA refused to divulge what a lobbyist-government relations firm was doing on its behalf in Washington, D.C. BPA sought to delete information showing the firm's activities. Once again, the Office of Hearings and Appeals ordered BPA to release more records. The documents show that the firm billed BPA for gathering unspecified political intelligence and passing on information

### In this Issue:

**We examine BPA's compliance with the Freedom of Information Act**

**The secret price of wind power**

**Page 3**

**Why does BPA need a consultant for help in D.C.?**

**Page 6**

**What should Congress and the Obama Administration do?**

**page 8**

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quietly to BPA Administrator Wright and the White House.

At other times, BPA has responded to FOIA requests by saying it has no records, even though by law BPA must keep commercial documents for years, sometimes decades.

We delve into those examples and others later in this newsletter. First, some background information about BPA and the FOIA process.

## BPA's Mission

BPA is part of the U.S. Department of Energy, but it is located in Portland, Oregon, and has a regional mission. BPA sells and delivers electricity from 31 federal dams, a nuclear power plant, several wind farms and other sources. More than 140 utilities in the Pacific Northwest depend on this supply. To deliver the power, BPA owns and operates 15,000 miles of high-voltage transmission lines.

But BPA does not rely on annual appropriations of money from Congress, like most other federal agencies. Instead, BPA collects approximately \$3.3 billion per year from rates for wholesale power

and transmission paid by utilities, power marketers and others. In the vernacular of the federal government, BPA is a “self-financing agency” and has been granted an unusual amount of autonomy.

## BPA, as a federal agency, must comply with FOIA.

When it comes to FOIA, however, there is nothing special about BPA's obligations. BPA, like any other federal agency, must comply with FOIA, which Congress enacted in 1966 and which now includes electronic, not just paper records.<sup>3</sup>

The FOIA is a hugely important law in the effort to make the federal government more open and transparent. FOIA *assumes* all federal government records are public unless they fit into one of nine exceptions.<sup>4</sup>

The exceptions include:

- National security documents that are classified;
- Internal personnel practices;
- Trade secrets and commercial or financial information;
- Medical files of employees and other records whose disclosure would constitute an invasion of personal privacy;
- Inter-agency or intra-agency work product; and
- Law enforcement records.

It is the agency's responsibility to assert convincingly which exemption, if any, applies.

The burden is on the agency to explain *why* it is withholding the requested documents.

## The FOIA Process

The FOIA process -- at BPA and other federal agencies -- is supposed to work like this:

1. A requester -- a citizen, reporter, corporation or anyone else -- submits a letter or e-mail saying what he or she wants. The requester agrees to pay fees (usually small) for searching and copying documents.<sup>5</sup>
2. The federal agency “logs” in the request, confirms to the requester that it has received his/her request, and establishes a 20-working day deadline, which the agency can unilaterally extend for 10 working days.
3. The agency's FOIA office then assigns an “authorizing official” who is responsible for gathering the records and giving them to the FOIA office, which releases them or claims an exemption, describing why it is withholding the documents.

In the case of BPA, a requester who is unsatisfied can appeal to the Office of Hearings and Appeals (“OHA”) within the Department of Energy.<sup>6</sup> OHA can order the agency to release material or sustain its conclusion.<sup>7</sup> A requester can then take the matter if he or she wishes to federal court.

That – in theory – is how the FOIA process works. At BPA, however, the actual process is at times slow and secretive. The following vignettes tell the story.

### What did Alcoa ask BPA to do?

#### The Alcoa Proposal

Only last month, in October 2008, BPA proposed signing a long-term \$1.1 billion contract with Alcoa to supply its Intalco aluminum smelter in Washington State starting in 2012. BPA announced it had signed a memorandum of understanding on contract principles and was asking for public comment. After the comment period closes, BPA plans to finalize contract terms and then release the agreement for public review, too.<sup>8</sup>

Sounds open and transparent, doesn't it? But what did Alcoa ask BPA for?

We do not know because BPA has taken five months to decide whether to release Alcoa's initial proposal or not.

The initial FOIA request for Alcoa's proposal was submitted on March 31, 2008, by Canby Utility, a municipal utility in Oregon. BPA logged the request on April 2, 2008. The deadline (with extension) called for BPA to respond by May 14, 2008.<sup>9</sup>

When the deadline expired, BPA refused to release any documents. BPA said it was conducting a review under exemption 4 (trade secrets/

commercial and financial information) of FOIA to evaluate whether it could, in fact, release Alcoa's proposal.

BPA clearly has the right – and arguably, it has a legal obligation to Alcoa – to conduct this evaluation. But BPA's FOIA office asserted it could take as long as it wanted to complete the review with no deadlines.<sup>10</sup> The result? BPA still has not released any information.<sup>11</sup>

### BPA sometimes thwarts the release of records.

Furthermore, BPA refused to comply with a federal regulation that *requires* agencies within the Department of Energy to set dates for the expected release of information.

Under the regulation, a FOIA requester who has not received a timely response may demand that BPA send him/her a letter, explaining the reason for the delay.

The letter must also establish a date on which BPA will likely determine whether it will release or withhold the requested records. In addition, the BPA letter must acknowledge that the requester can seek a remedy through the courts, though BPA may ask the requester to "forego" this legal action until it makes a final decision.<sup>12</sup>

When Canby Utility recently requested BPA to send the letter, BPA's FOIA office ignored its request and did not respond to e-mails.<sup>13</sup>

#### The Klondike Wind Contract

In other cases, BPA has redacted (edited out) price information from contracts – information that would say how much it paid for electricity.

Over the years, BPA has bought electricity from a number of wind farms, including the Klondike wind plant in Oregon. In the case of Klondike, the contract was awarded on a sole-source agreement. No competitive bidding. And the price? It's secret.

BPA recently released the Klondike wind contract pursuant to FOIA but it deleted any reference to price. Why? Because BPA considers price information to be commercially-sensitive and proprietary.<sup>14</sup> But the utilities that buy power pass on BPA's costs to their retail consumers. *Their* costs are public – there is no secret in what people are paying in power rates when they turn on the lights in Seattle or Richland or Eugene.

Does anyone consistently monitor BPA's new acquisitions of power? The answer is no, particularly if they are small in size. There is no regional mechanism to analyze how well or badly BPA is doing in acquiring new power if the projects are less than a certain threshold spelled out in the Northwest Power Act.<sup>15</sup> This is not to suggest that BPA always does poorly when it buys power. BPA has intelligent staff with experience in the power industry. But there are no checks and balances in the system, no procedures to audit BPA's activities on a regular basis, no one from





the outside empowered to say, “let me see that contract – and don’t withhold anything.”<sup>16</sup>

## The Longview Aluminum Contract

Suppose a federal agency makes a decision worth a quarter billion dollars with no paper trail to explain its actions. What would members of Congress typically have to say about that? We can guess, of course. They would be upset. They would demand answers. BPA, however, is different. Located 3,000 miles from Congress, BPA can remain secretive with few adverse political consequences.

## Here is What Happened:

At the height of the 2001 energy crisis, BPA signed a \$226-million contract with a poorly-capitalized company, Longview Aluminum, L.L.C., which wanted to buy an aging aluminum smelter in Longview, Washington State.

Under the contract terms, BPA agreed to pay the money to Longview Aluminum if it bought the smelter with BPA money and then stopped buying BPA power. At the time, BPA was short of power and prices on the West Coast had skyrocketed. BPA had concluded it was cheaper to pay the

new owner to shut down the smelter for 16 months rather than to continue as a BPA customer.

But BPA set conditions for what Longview Aluminum could do. BPA required the company to use federal money to: 1) buy the smelter from its existing owner, Alcoa; 2) pay workers during the temporary shut-down period; 3) refurbish the plant; and 4) re-open when the crisis was over, thus preserving jobs. What actually happened? BPA paid the \$226 million, the workers were laid off and the plant never re-opened. [Click here](#) for a **BPA Watch** newsletter on the Longview story.

How did BPA decide on the \$226 million amount? BPA said it has no records. If BPA is to be believed, it signed the contract with no background research, no negotiations to determine the price and no due diligence. Asked to provide information about how it agreed to the price, BPA said simply that it had no responsive documents.<sup>17</sup>

BPA’s response begs the question: is it being truthful? What good is FOIA if the agency never keeps or if it destroys records showing how it does business?

Who rode on  
BPA’s planes?  
BPA attempted to  
prevent disclosure of  
this information.

## The BPA Plane

BPA owns two planes used to transport staff to locations around the Northwest.

The BPA plane typically handles six passengers and the pilot. Nothing fancy. It’s a working aircraft. No bar. No leather seats. No movies.

Who rides in the BPA planes?

When **BPA Watch** asked for the manifest for 2007, what did BPA do? BPA claimed a “privacy” exemption for everyone other than BPA Administrator Wright. BPA released 255 pages of records showing where the planes went, what time they left, what time they returned – but it deleted the names of all passengers, except for Wright. BPA argued that its employees and others who rode the plane had a privacy interest even if they took the plane during business hours to go to a business meeting.

**BPA Watch** filed an appeal. The Department of Energy’s Office of Hearings and Appeals disagreed with BPA’s claim of privacy. “We find that the BPA has not met its burden to show that disclosing the passenger names compromises a substantial privacy interest,” OHA said.<sup>18</sup> In response, BPA released the manifest. **BPA Watch** is currently examining the document and has requested additional records.

## The Missing Recusal

Then there is the strange case of the recusal that never existed.

On November 9, 2000, BPA Administrator Judi Johansen announced her departure after two years as head of the agency. Her new job: executive vice president of PacifiCorp, the largest investor-owned utility in the region and a BPA customer.



BPA's press release said Johansen had "recused herself" from making any decision affecting PacifiCorp when the company approached her "a few weeks ago," but BPA did not say when the recusal took effect.<sup>19</sup>

BPA, asked under FOIA to provide a copy of Johansen's recusal statement, said it could not find any. Nor could the Department of Energy. "We conducted a search of our files for documents responsive to the request. The search, however, did not locate any responsive documents," the Department said.<sup>20</sup>

But Johansen had a serious potential conflict of interest that probably *required* a formal, written recusal. On October 4, 2000, a month before her announced departure, Johansen signed a Record of Decision "settling" the Residential Exchange Program and agreeing to sign contracts with PacifiCorp and the region's private power companies (also called "investor-owned utilities" to distinguish them from publicly-owned utilities, such as Seattle City Light, which are public agencies).<sup>21</sup>

Under the Residential Exchange Program, BPA pays cash to these companies for their residential and small-farm consumers. Although BPA is normally in the business of selling power, not providing cash payments, the Residential Exchange Program is an exception. The purpose of the program is to help reduce the disparity between power rates in the region. The companies, like PacifiCorp, pass on the benefits to their consumers as a rate credit on their monthly bills. The companies do not make a profit on the

transaction. But the Residential Exchange Program provides them with an important, intangible result: it helps create political stability and reduces the likelihood that their residential and small-farm consumers will clamor to establish a public power utility in their territory.

Given those circumstances, it is fair to ask: when, exactly, did Johansen begin negotiating with PacifiCorp for a job? Did she sign the Record of Decision before or after the company first approached her? How could she comply with federal conflict-of-interest rules if she did not leave a paper trail? Unfortunately, we do not know. BPA said it has no records.

### BPA's Calendars

In yet another case, BPA has gone to considerable effort to keep records from being released. When BPA was forced to make the documents public, BPA released only edited copies, not originals. And the original documents have been mysteriously destroyed. BPA cannot explain how or why.

Consider the calendars of Charles Meyer, a BPA vice president. Meyer, who left BPA last year, is a controversial figure in the trial of a fellow BPA employee, Janie Selby. In 2005, the federal government indicted Selby on 10 counts of conflict of interest, wire fraud, tampering with a witness and other charges. The government alleged Selby used her influence at



NOVEMBER calendar						
MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SAT/SUN	
	May 1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

BPA to advocate that BPA purchase and use a software product developed by a company called Knowmadic, where her husband worked as a salesman.<sup>22</sup> In 2007, a jury in Portland, Oregon, convicted Selby of three counts (but found her not guilty of tampering with a witness), and she was sentenced to four-months at the YWCA in Portland. Selby's appeal is now pending in the U.S. Court of Appeals for the Ninth Circuit.

**BPA cannot explain what happened to the original electronic calendars.**

The Selby indictment and conviction shook many BPA employees – it was the first time a BPA employee had been charged with a crime. Making matters more unsettling, Selby was considered by many to be an exemplary, veteran worker.

Meyer was Jane Selby's boss, and he testified under oath at her trial that he did not understand the facts until it was too late for him to intervene. Meyer's testimony was greeted with skepticism



by Selby's lawyers, who argued that Meyer knew of Selby's activities, that he regularly had meetings with Selby and other BPA staff to discuss the Knowmadic contract, and that he listed BPA's successful relationship with Knowmadic on his own annual performance evaluation.<sup>23</sup>

**BPA Watch**, which is pursuing the Selby story, submitted a FOIA request for Meyer's calendars for the years 2001-2003, the period when BPA contracted with Knowmadic.

BPA resisted. At first, a lawyer in the Office of General Counsel said BPA had to redact the calendars and delete extensive private notations. Then, BPA changed its mind and sought to block release of the calendar entirely. BPA argued that Meyer's calendars were not agency records and were therefore not subject to FOIA. **BPA Watch** appealed to the Office of Hearings and Appeals and won.<sup>24</sup>

But when BPA released the Meyer calendars in August 2008, some of the calendars were virtually empty for days and sometimes weeks on end. The calendars, originally created in electronic form, had been preserved by BPA only in hard copy and stored in BPA's Office of General Counsel. But there were missing periods – blank days with nothing on them.



BPA said there is no way to reconstruct the missing entries because the original electronic calendars have been destroyed. Why? BPA said it does not know. When? BPA does not know that either. What we do know is this: the partially blank calendars are all that is left.

## **BPA's Contract For Help in D.C.**

Perhaps the most intriguing – and troubling – FOIA response deals with a lobbyist and government relations consultant who reports regularly to BPA Administrator Stephen Wright. Under federal law, BPA and other agencies cannot lobby Congress.<sup>25</sup> Yet for the last seven and a half years, BPA has had a firm under retainer for help in Washington, D.C.

BPA signed the contract shortly after George Bush was elected President in 2000. At the time, BPA Administrator Wright was serving in an interim capacity: he was a Democratic Party holdover, named to succeed Administrator Johansen.

In spring 2001, BPA took the unusual step of hiring the consulting firm, Washington2 Advocates ("W2A"). The firm has offices in Bellevue, Washington State, and Washington, D.C. To date, BPA has paid the firm \$640,000.

Why BPA needed a lobbying-government relations firm for assistance is a question that has never been fully answered. BPA has a small D.C. office to provide information to members of Congress and analyze bills that may affect its

operation. Administrator Wright knows well the arcane ways of our nation's capital. For several years, he headed the D.C. office before he became BPA Administrator.

For whatever reason, BPA decided it wanted help. One of the principals of W2A firm, Tony Williams, had served as chief of staff to Slade Gorton, the incumbent Republican senator from Washington State who lost his bid for re-election in 2000. Williams had good political connections, particularly among Republican Senators and their staff, and a thorough grasp of the political process.

## **Why does BPA need a lobbying-government relations firm to help in D.C.?**

So Wright turned to Williams for "strategic counsel." The W2A firm had been formed only weeks before BPA signed a contract to pay it a retainer of \$7,500 per month, which BPA continued to do through 2008.<sup>26</sup>

## **Does the Consultant Always Disclose BPA is his Client?**

The scope of work said Williams would gather information from Congress and the Bush Administration – and pass it on to BPA. But the contract also implied Williams might not always disclose the fact that BPA was his client when he met with Congressional or Bush Administration staff.<sup>27</sup>





Both BPA and Williams insist that he does not lobby Congress or the White House on BPA's behalf and that he has consistently obeyed Department of Energy rules and regulations.

But what does the firm do for BPA? Even to this day, we do not know much. Initially, Williams submitted monthly invoices for \$7,500 showing no work accomplished at all. Furthermore, he billed BPA for travel associated with attending several political fundraisers, clearly an improper expenditure of federal funds. The firm later refunded the money and apologized for what it said was a mistake.<sup>28</sup>

### Should we re-name Grand Coulee Dam and call it “Grand Steve”?

E-mail traffic, released by BPA pursuant to a FOIA request, showed that Williams and the BPA staff in the D.C. office often exchanged political gossip and banter. But BPA rarely obtained written work product from the firm, at least not for the first years of the contract.<sup>29</sup> When asked in a FOIA request to provide a log of people Williams talked to on BPA's behalf, BPA said it had none.<sup>30</sup>

In 2004 and again in 2005, the author of this article (prior to the creation of **BPA Watch**) asked the Inspector General (“IG”) of the Department of Energy to investigate the contract.<sup>31</sup> The IG closed both investigations without taking any public action.

But at some point in time, BPA – at the request of the IG or on its own initiative – decided it needed to keep better records of how W2A spent federal money.

Starting in 2005, Williams submitted a one-page Statement of Work with the invoice describing what he had done the previous month.



### The Statements of Work

The Statements of Work showed, among other things, that Williams billed BPA for items such as having “several conversations with political appointees inside the White House and the Administration who wanted background information” on the reaction in Congress to the President's proposed budget.<sup>32</sup> What benefit BPA gained from this is not known.

In another instance, Williams announced to BPA he would attend a golf tournament to benefit Idaho Rep. Mike Simpson's 2006 re-election campaign, and “I will be able to talk directly to him, and to his staff... so I will poke around on this issue a bit, and report back what I hear.”<sup>33</sup> And the “issue” that is of concern to BPA? We do not know, except that it had something to do with an “Idaho delegation letter.” BPA deleted the rest of the e-mail.

Other records show Williams, who had recently moved from Washington, D.C., to the Seattle area, helped obtain favorable press coverage for BPA in 2007. After a glowing editorial in *The Seattle Times*, Williams sent Administrator Wright the following e-mail:

*Steve – The Seattle Times has a great editorial this morning on the latest [BPA] rate reduction...heck, I've only lived here [in Seattle] for two weeks, and look at the press you're getting...give me another month, and they'll be calling for Grand Coulee to be re-named Grand Steve.*<sup>34</sup>

Despite the release of this and other intriguing e-mails, BPA insisted on deleting items from Williams's Statements of Work. The author appealed.

The Office of Hearings and Appeals sustained some of BPA's deletions but ordered it to release more information.<sup>35</sup> Among the released materials was a portion of a Statement of Work showing that Williams met on BPA's behalf with the director of the President's Council on Environmental Quality (“CEQ”).

**BPA Watch** then filed a FOIA request with the CEQ to learn what was discussed. But the CEQ response showed that Williams initiated the meeting on behalf of a private company, Ramgen Power Systems, a firm in Washington State that is seeking to commercialize aircraft technology for other uses, such as carbon sequestration. The CEQ provided no documents suggesting that BPA had anything to do with the meeting.<sup>36</sup>



## Private Meetings with the OMB Director

In 2008, the author submitted yet another FOIA request for work product from W2A. BPA's response included Statements of Work submitted by Williams that showed he attended private meetings on behalf of BPA in October 2007 and January 2008 with Jim Nussle, head of the powerful Office of Management and Budget ("OMB").<sup>37</sup>

What did Williams talk about with Nussle on behalf of BPA?

OMB records suggested the dinner meeting in October 2007 was intended to be partly personal. "Consider the topic of the meeting to be 'personal and professional update' or some such thing," a W2A staffer said in an e-mail to OMB in advance of their dinner. Nussle indicated he would bring his wife.<sup>38</sup>

And the January 2008 breakfast meeting with Nussle? OMB records do not describe what was discussed but Williams was apparently lobbying on behalf of Weyerhaeuser, not BPA. Subsequent e-mails from W2A to OMB described a follow-up meeting between OMB and Weyerhaeuser CEO Steve Rogel and other corporate officials. Williams had apparently laid the groundwork for the OMB-Weyerhaeuser meeting when he met with Nussle.<sup>39</sup>

Is it possible that BPA matters were nonetheless discussed at these sessions with OMB director Nussle? Yes, it is common for lobbyists and consultants to have multiple clients and purposes to a meeting. But BPA has no record

of any communications (including e-mails) with Williams regarding these sessions.

Nor has BPA answered this basic question: If BPA Administrator Wright had something to say to OMB Director Nussle, why didn't he call him on the phone, or send him an e-mail, or talk to him in person? Why use Williams as an intermediary?

## What Congress and the Obama Administration Can Do

This newsletter has raised questions and provided few answers for a reason. BPA has destroyed too many records and refused to release others for us to reach a definitive conclusion.

The examples cited in this newsletter – the secret wind power contract, the FOIA deadlines that BPA ignores, the missing recusal, the calendars with blank spaces, and the secretive work performed by a consultant who has access to political staff at the White House – all illustrate the problem. BPA, simply put, is not transparent.

The problem, however, is not new, nor is it a partisan issue. BPA did not become secretive just in the last eight years – some of the problems go back a decade or more. The election results therefore offer an opportunity for both Democrats and Republicans. In the last few months, we heard a good deal about the need for reform from both presidential candidates.

Let's put the avowed interest in change to a test. It's now been more than 15

years since Congress held an oversight hearing on BPA.

Perhaps a Congressional committee, in reviewing the practices of federal agencies under FOIA, should include BPA within the ambit of its review and hold a hearing to inquire about some of the examples cited in this newsletter. Perhaps it's time for the Department of Energy to exert more control over how BPA keeps records and responds to FOIA requests. The press in the region and elsewhere, which usually ignores BPA or prints its press releases without asking tough questions, can scrutinize BPA's behavior, too. There are multiple opportunities to watch BPA and make it more accountable.

**END**

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## ENDNOTES

1. For BPA's major publications, see [www.bpa.gov/corporate/pubs](http://www.bpa.gov/corporate/pubs).
2. For BPA's FOIA home page, see [www.bpa.gov/corporate/public\\_affairs/FOIA/Reading\\_Room.cfm](http://www.bpa.gov/corporate/public_affairs/FOIA/Reading_Room.cfm).
3. President Lyndon B. Johnson signed FOIA but was very skeptical about the statute. Documents from his presidential library "show that the normally gregarious President, who loved handing out pens at bill signings, refused even to hold a formal ceremony for the FOIA ... [and] personally removed strong openness language from the press statement," according to the National Security Archive at George Washington University. For a history of FOIA, see [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm).
4. Courts generally interpret the FOIA exceptions narrowly. *Dept. of Interior v. Klamath Water Users*, 532 U.S. 1, 7-8 (2001).
5. FOIA allows for agencies to waive fees in certain circumstances. See DOE regulation 10 C.F.R. § 1004.9 based in part on the type of requester.
6. For a list of all OHA cases, see [www.oha.doe.gov/foia/foia08.asp](http://www.oha.doe.gov/foia/foia08.asp).
7. OHA can also remand the matter back to the agency for an additional search or for an additional explanation. OHA therefore has a number of remedies at its disposal.
8. BPA said it plans to offer similar contract terms to another aluminum smelter, owned by the Columbia Falls Aluminum Corp. ("CFAC") in Montana.
9. The author represents Canby Utility. See FOIA request #08-36 at BPA's FOIA web site, [www.bpa.gov/corporate/public\\_affairs/foia/2008/Indexpage8.html](http://www.bpa.gov/corporate/public_affairs/foia/2008/Indexpage8.html).
10. There were numerous e-mails and phone calls between the author and the FOIA office. In one typical exchange, the author inquired about the status of this FOIA and was told that BPA staff had scheduled meetings with Alcoa to discuss what BPA could (or could not) release. But BPA did not set a deadline for making a decision. BPA's FOIA Office, apparently on advice of the Office of General Counsel, insisted that once it initiates a review under an exemption of FOIA, there are no deadlines. BPA's interpretation leads to absurd results. The 20-day "clock" (with a 10-day extension) has no meaning if the agency is conducting an exemption review. But virtually all FOIA requests implicate one or more possible exemptions under FOIA.
11. An e-mail from BPA as this newsletter was going to press indicated BPA would likely release information by mid-November 2008.
12. 10 C.F.R. § 1004.5(d)(4).
13. To be fair to the FOIA office, it is small (and sometimes overworked), and its staff cannot compel others in the agency to take action. If someone higher up at BPA drags his feet and declines to take FOIA deadlines seriously, the FOIA office is limited in what it can do. That is apparently what happened in this case. BPA took a similar slow approach in responding to another FOIA request from Canby Utility asking for communications between BPA and the region's investor-owned utilities ("IOUs"). The request asked for BPA to release all communications (written or electronic) with the IOUs starting in May 2007, when the U.S. Court of Appeals for the Ninth Circuit invalidated BPA's contracts with the IOUs that "settled" the Residential Exchange Program. The FOIA request said that "communications" included e-mails and their attachments. First, BPA released some information in its "entirety" even though several e-mails did not have attachments. When Canby Utility pointed out the fact that key documents were missing, BPA went back to attempt to comply a second



time. On September 18, 2008, BPA released another batch of materials. Even then, however, one document was missing because BPA said it was still evaluating it under exemption 4 (trade secrets/proprietary information). Once again, BPA refused to set a deadline for finishing its review process. Only after Canby Utility complained about the continued delays to the U.S. Department of Energy did BPA finally respond on October 22, 2008, five months after the official due date.

14. BPA stated in a Record of Decision from October 2007 that it hoped the Klondike wind plant would produce power at a cost of \$63.50 per megawatt hour (“MWh”) over time. If true, that’s a pretty good price, twice as much as the existing federal power system but considerably less than many other wind plants. But did BPA really buy power at that price? We do not know.
15. The Northwest Power Act of 1980 requires BPA to hold a hearing and seek review from the Northwest Power and Conservation Council (formerly known as the Northwest Power Planning Council) if it acquires power from a “major resource.” See section 6c. 16 U.S.C. § 839d(c). The Act defines “major resource” as a plant in excess of 50 aMW and that is acquired by BPA for more than five (5) years. 16 U.S.C. §

839a(12). BPA acquired power from the Klondike wind plant for 20 years but it proposes to buy approximately 15 aMW from the plant (depending on performance). As explained in more detail in note 16 below, even when BPA sought to acquire power in excess of 50 aMW (thus triggering the “major resource” requirements of the Act), BPA succeeded in avoiding close scrutiny because it successfully withheld the entire agreement from the Council.

16. In the early 1990s, BPA signed an agreement to buy electricity from a natural gas-fired plant to be built by a developer, Tenaska, near Tacoma, Washington. BPA executives said the transaction was a good deal for the region because they could buy power from Tenaska when they needed it and curtail purchases when they had more cost-effective alternatives. Furthermore, if the price of natural gas rose, BPA would be in good shape. BPA had locked in the price. But BPA refused to release the complete terms of the Tenaska contract to the Northwest Power Planning Council, which by law had to find that the agreement was cost-effective and consistent with the Northwest Power Act. Under pressure, the Council ultimately approved the proposed Tenaska transaction without having seen the complete agreement. Six months later, Tenaska quietly filed an unedited copy of the

agreement with the Federal Energy Regulatory Commission. The contract showed that BPA had obligated itself to pay large sums of money if it displaced (reduced) purchases from the plant, contrary to BPA staff assertions. BPA ultimately defaulted on its obligations only a year later. BPA officials said they were surprised when natural gas prices fell after they signed the Tenaska contract. Left with the choice of paying high prices for power it did not need or paying money not to take power, BPA unilaterally terminated the agreement. In 1995, Tenaska filed a \$1 billion claim against BPA for expenses and lost profit from the partially-built plant. BPA ultimately paid about \$315 million. BPA then recovered that cost in power rates from utility customers. What would have happened if BPA had released the full contract prior the Council hearings? It is hard to say. But a skeptical member of the Council might have said, “wait a minute, this contract doesn’t do what you say it does.” No one said that because no one saw the agreement until it was too late.

17. See BPA response to FOIA request #06-003. The author of this article asked for all communications between BPA and Longview Aluminum and its agents (i.e., lawyers and consultants) regarding the amount to be paid by BPA to the company and



- how the final amount (\$226 million) was established and justified. On December 1, 2005, BPA responded. It said it was “unable to locate any communications” in response to the inquiry.
18. Appeal of **BPA Watch**, Case TFA-0260, July 11, 2008. The OHA ruling is available at [www.oha.doe.gov/foia/foia08.asp](http://www.oha.doe.gov/foia/foia08.asp).
  19. BPA press release #85-00, November 9, 2000, “Johansen announces departure from BPA; Wright to be named acting administrator.”
  20. See DOE response to FOIA F2004-00124, dated March 12, 2004, from Susan Beard, acting assistant General Counsel for General Law, to the author.
  21. The U.S. Court of Appeals for the Ninth Circuit invalidated BPA’s settlement contracts with the IOUs in 2007. *Portland General Electric v. BPA*, 501 F.3d 1009 (9<sup>th</sup> Cir. 2007), *cert. denied*, \_\_\_ U.S. \_\_\_ WL318294 (June 9, 2008). The court also invalidated the BPA rates that forced public power utilities to pay for BPA’s settlement contracts. *Golden NW Aluminum v. BPA*, 501 F.3d 1037 (9<sup>th</sup> Cir. 2007), *cert. denied*, WL318294 (June 9, 2008).
  22. *U.S. v. Selby*, CR-05-234. See press release from the U.S. Department of Justice dated June 15, 2005, charging Selby, age 48, in federal district court in Portland, Oregon.
  23. Selby’s lawyers argued that Meyer’s disavowal of knowledge of Selby’s activities was not truthful. “Chuck Meyer is lying to protect himself. He’s got a tier 1 [executive] management position now with BPA. He’s not going to jeopardize that by admitting that he knew everything that was going on with this vendor [Knowmadic]. He’s turned his back on his loyal deputy [Selby] and stabbed her in the back, and you shouldn’t let him get away with that.” Transcript of closing argument of defense attorney Per Olson in Selby trial, *U.S. v. Selby*, CR-05-234, Dec. 6, 2006, at page 83.
  24. Appeal of **BPA Watch**, case TFA-0263, August 21, 2008. **BPA Watch** also requested the calendars of another BPA employee, Mark Wilczewski, but the Office of Hearings and Appeals held that his calendars were not agency records, and it sustained BPA’s decision to withhold their release.
  25. 18 U.S.C. § 1913 (prohibition on the use of appropriated funds for lobbying).
  26. W2A was incorporated in Washington State on April 27, 2001. See Secretary of State corporate files for UBI no. 602-116-456. BPA signed the contract in May 2001.
  27. BPA’s initial scope of work with W2A said: “Consultant will perform no inherently government functions [sic] and will inform others when Consultant’s relationship and limited role with BPA may be misunderstood. Consultant will abide by any Federal or Department of Energy lobbying restrictions.” The awkward wording of this paragraph raises questions: Do BPA’s instructions require Williams to disclose BPA’s role in hiring him only when others may misunderstand it, and not in all dealings?
  28. See, for example, W2A’s invoice dated August 1, 2001, showing that BPA paid for one-third the expenses (airfare, car rental, parking, etc.) associated with Williams attending a fund-raiser for Senators Patty Murray (D-WA.) and Gordon Smith (R-OR.). W2A later refunded this money. But in the early days of the contract, W2A also billed BPA for meals, including one in which Williams had dinner in 2001 with former Senator Slade Gorton (R-WA.) and deputy Secretary of Energy Frank Blake. BPA has no records of what was discussed at the meeting. Williams also billed BPA for a dinner with BPA Administrator Wright. BPA has no records of what was discussed at that meeting either. On other occasions, Williams billed BPA for meals with Congressional staff. See, for example, his invoice dated December 1, 2001, where Williams billed BPA for lunch at La Colline, a D.C. restaurant, with Mike Ware, chief of staff for



- Senator Larry Craig (R-Idaho). This practice appears to have stopped soon after BPA released the firm's invoices in response to a FOIA request.
29. "Can you do The Bone this week?" Williams e-mailed BPA vice president Jeff Stier, the head of the D.C. office, in 2004 about meeting at a popular Capitol Hill bar. E-mails such as this would not be unusual if the company could also show a work product. But BPA can produce few, if any, reports or analyses from the company. See, for example, BPA's response to FOIA #04-006, dated November 21, 2003. In response to a request for all reports, analysis and materials submitted by Williams or the firm to BPA, the agency said: "After a thorough search of our records, we have no documents that respond to this portion of your FOIA request."
30. See, for example, BPA's response to FOIA request #08-32. The author asked for the names, dates and titles of all individuals contacted by W2A on behalf of BPA. BPA responded on April 8, 2008: "We have no responsive documents to this request." BPA's response is consistent with prior FOIA responses. Asked in 2005 for the same information, BPA responded: "BPA does not possess any documents or materials that are responsive to your request."
31. See IG investigation #IO4RS076. The author submitted the initial request for an IG investigation on behalf of a utility client.
32. See February 2006 Statement of Work, submitted by Tony Williams of W2A to Sonya Baskerville, head of BPA's office in Washington, D.C., contained in BPA response to FOIA #07-13 at page 8.
33. See BPA response to FOIA #07-13 at page 157.
34. See BPA response to FOIA #07-13 at page 31.
35. See Appeal of the Columbia Research Corporation, TFA-0193, March 20, 2007.
36. See CEQ response dated May 16, 2008 to the author.
37. See BPA response to FOIA #08-32 at pages 204 and 207. The Statement of Work submitted by W2A for October 2007 includes the following activity: "I had a dinner meeting in Washington, D.C. with the OMB Director where BPA and other regional issues were discussed." The Statement of Work submitted by the firm for January 2008 includes the following activity: "I had a one-on-one breakfast meeting with the President's OMB Director, Jim Nussle, where we discussed 20-year contracts and the net secondary revenue issue."
38. See OMB response dated August 5, 2008 to **BPA Watch**.
39. See OMB response dated August 5, 2008 to **BPA Watch**.