

United States Department of Energy
Office of Hearings and Appeals

In the matter of Post Register)
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Filing Date: May 17, 2013) Case No.: FIA-13-0029
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Issued: June 12, 2013

Decision and Order

On May 17, 2013, Post Register (“Appellant”) filed an Appeal from a determination issued to it by the Idaho Operations Office (IOO) of the Department of Energy (DOE) (FOIA Request Number ID-2013-00814-F; OM-PA-13-022). In its determination, IOO responded to the Appellant’s request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. IOO determined that the Appellant sought documents that were not in its possession as they were the property of its contractor, Battelle Energy Alliance, LLC (BEA). This Appeal, if granted, would require IOO to release the requested records and to conduct another search for documents.

I. BACKGROUND

The Appellant requested fourteen documents concerning the Advanced Test Reactor safety measures and risk assessments, and other “vulnerable non-safety systems.” *See* Determination Letter from Clayton Ogilvie, FOIA Officer, IOO, to Corey Taule (Apr. 9, 2013). In its Determination Letter, IOO stated that it conducted a search of its Office and could only locate two responsive documents, which it released, and, notwithstanding, most of the requested documents were not agency records as they were the property of BEA. *Id.* at 2. The two released documents were presentations, which IOO described as “responsive to the request for background materials that supported the Grossenbacher article in the Post Register.” *Id.* On May 17, 2013, the Appellant appealed IOO’s determination, claiming that it failed to conduct an adequate search for documents responsive to its FOIA Request and that IOO should have released the requested documents.

II. ANALYSIS

The FOIA applies to agency records. *See* 5 U.S.C. § 552(f)(2)(A) (“‘record’ and any other term used in this section in reference to information includes – (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format”). The FOIA does not specifically set forth the attributes

that a document must have in order to qualify as an agency record that is subject to FOIA requirements. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *Id.* The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

- (1) The intent of the document's creator to retain or relinquish control over the document;
- (2) The ability of the agency to use and dispose of the record as it sees fit;
- (3) The extent to which agency personnel have read or relied upon the record; and
- (4) The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (2010).

Here, in applying the first factor of the four-factor test, IOO stated that the documents were retained by BEA. IOO provided a memorandum from BEA, wherein BEA stated that it was not aware of any federal agency that "has had access to BEA's management system which may contain/maintain the information sought by the requesters." *See* Email from Al Hoiland, FOIA/PA Officer, BEA, to Clayton Ogilvie, FOIA Officer, IOO (Apr. 8, 2013). In regards to the second factor, in order to respond to the FOIA Request, IOO contacted BEA and determined that BEA had the documents that were responsive to the FOIA Request. The requested records were neither created, nor obtained, by IOO or any other DOE office, and therefore, IOO stated that the requested records were the property of BEA. *See* Determination Letter from Clayton Ogilvie, FOIA Officer, IOO, to Corey Taule (Apr. 9, 2013). Thus, IOO did not have the ability to use and dispose of the records without contacting BEA. *Id.* Regarding the third factor, IOO has not indicated that its personnel read or relied on the requested records, and in regards to the last factor, the requested documents are separate from IOO's record keeping system or files as BEA confirmed that only BEA retains the documents. *Id.* Therefore, based on the four-factor test, we cannot conclude that the requested documents are agency records.

However, a finding that certain documents are not "agency records" does not end our inquiry. DOE's FOIA regulations state:

When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2).

10 C.F.R. § 1004.3(e).

In its Determination Letter, IOO cited to its contract, specifically, Clause I.15(b)(3) of Department of Energy Acquisition Regulation (“DEAR”) 970.5204-3, to support its argument that the records are contractor-owned. However, that clause identifies “contractor-owned” records as including “[r]ecords relating to any procurement action by the contractor.” The requested records concerning safety measures, risk assessments, and other “vulnerable non-safety systems” are not procurement records, and the cited DEAR section does not provide that such records are contractor-owned; rather, the contract indicates that such records are government-owned.¹ See *In the Matter of Snake River Alliance*, OHA Case No. TFA-0468 (2011)²; *In the Matter of Donald A. Verrill*, OHA Case No. TFA-0364 (2010). More importantly, BEA subsequently agreed that the DEAR Clause it cited – I.15(b)(3) – was not applicable as the requested documents are not procurement-related records. Memorandum of Telephone Conversation between Al Hoiland, BEA, FOIA/PA Export Compliance Officer, and Shiwali Patel, Attorney-Examiner, OHA (June 6, 2013). BEA further acknowledged that it could not cite to any clause in its contract rendering the requested safety measures, risk assessments, and other “vulnerable non-safety systems” documents as contractor-owned. *Id.* Thus, we cannot conclude that the requested documents are contractor-owned records, and we will remand this matter to IOO to issue a new determination.

Accordingly, we do not need to review the Appellant’s argument pertaining to the adequacy of IOO’s search for responsive records as we are remanding this matter to IOO.

It Is Therefore Ordered That:

(1) The Freedom of Information Action Appeal filed by the Appellant on May 17, 2013, OHA Case Number FIA-13-0029, is hereby remanded as specified in Paragraph (2) below.

(2) This matter is hereby remanded to the Idaho Operations Office, which shall issue a new determination as to the documents that are the subject of the instant FOIA Request.

(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.

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¹ “Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.”

² Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>.

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