

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Larry W. Long)		
)		
Filing Date: August 10, 2012)	Case No.:	FIA-12-0046
)		
_____)		

Issued: September 7, 2012

Decision and Order

On August 10, 2012, Larry W. Long (Appellant) filed an Appeal from a determination issued to him on July 24, 2012, by the Oak Ridge Office (Oak Ridge) of the Department of Energy (DOE) (Request No. ORO-2012-01507-F). In that determination, Oak Ridge stated that it did not locate any documents responsive to a request for information that the Appellant had filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require Oak Ridge to conduct a further search for responsive documents.

I. Background

On April 17, 2012, the Appellant submitted a FOIA request to Oak Ridge for copies of the Benefit Value Studies (Ben-Val Study) for URS | CH2M Oak Ridge LLC (UCOR) and Bechtel Jacobs Company, LLC, "Mercer or AON/Hewitt Studies,"^{*/} and similar information from DOE. Request Letter dated June 13, 2012, from Appellant, to Amy Rothrock, FOIA Officer, Oak Ridge. Oak Ridge, in response to the request, stated that the Ben-Val Study for UCOR and Bechtel Jacobs are contractor records, and therefore, not subject to the FOIA. Determination Letter dated July 24, 2012, from Amy Rothrock to Appellant. In addition, Oak Ridge indicated that any documents pertaining to the Mercer or AON/Hewitt studies were in the possession of procurement at DOE Headquarters. *Id.* Therefore, Oak Ridge forwarded that portion of the request to the Office of Information Resources at DOE Headquarters. *Id.* That portion of the request is not at issue in this Appeal.

* Because these documents are within the purview of DOE Headquarters, Oak Ridge did not know what "AON" stood for or whether Mercer was the full name of the company. E-mail dated August 29, 2012, from Amy Rothrock, FOIA Officer, Oak Ridge, to Janet R. H. Fishman, Attorney-Examiner, Office of Hearings and Appeals (OHA).

On August 10, 2012, OHA received the Appellant's Appeal, which challenges Oak Ridge's claim that the documents are contractor records. Appeal Letter dated July 31, 2012, from Appellant to OHA, DOE.

II. Analysis

The Appellant challenges Oak Ridge's claim that all responsive documents are not "agency records" but rather contractor records and, therefore, not subject to the FOIA. The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Oak Ridge, after conferring with its procurement attorneys and the head of the Industrial Personnel Branch of its Human Resources Division, concluded that the records were neither in the possession nor control of Oak Ridge at the time of the request and, therefore, were not agency records. Determination Letter at 1-2

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

When a contract with the 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). The Appellant argues that UCOR could not have conducted the Ben-Val study without direction from the DOE because the study is only required to be conducted every three years. Appeal Letter at 1. He also argues that the Ben-Val study must be in DOE's possession. Oak Ridge determined that any documents that may exist were contractor records under the contract between UCOR and DOE. Determination Letter at 1; E-mail dated August 16, 2012, from Amy Rothrock to Janet Fishman, OHA, DOE. We have reviewed the pertinent contract clause and we agree with Oak Ridge's interpretation. The contract between UCOR and DOE clearly states that the components of the study, *i.e.*, records on salary and employee benefits, are contractor records. DOE Contract No. DE-SC-0004645 (DEAR § 970.5204-3, "Access To And Ownership of Records"). In view of the explicit language of the contract, we must deny the Appeal.

For the reasons give above, we have determined that UCOR's records were not agency records. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Larry W. Long, OHA Case No. FIA-12-0046, is hereby denied.
- (2) This is a final order of the Department of Energy of 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: September 7, 2012