

United States Department of Energy
Office of Hearings and Appeals

In the matter of Robert Huber.)
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Filing Date: November 1, 2012) Case No.: FIA-12-0070
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Issued: November 14, 2012

Decision and Order

On November 1, 2012, Robert Huber (“Appellant”) filed an Appeal from a determination issued to him by the Idaho Operations Office (IOO) of the Department of Energy (DOE) (FOIA Request Number ID-2012-01864-F; OM-PA-12-043). 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.

The Appellant requested DOE National SCADA Test Bed complete assessment (NSTB) results performed at the Idaho National Laboratory operated by BEA. Determination Letter from Clayton Ogilvie, FOIA Officer, to the Appellant (Oct. 1, 2012). In its Determination Letter, IOO informed the Appellant that the documents he sought were the property of BEA pursuant to the Management and Operating Contract (DOE Contract No. DE-AC07-05ID14517), DEAR § 970.5204-3, “Access to and Ownership of Records,” and that accordingly, it was not an agency record. *Id.*

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 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).

In response to our inquiries, IOO informed us that the requested documents concerned a “Work for Others” project that BEA performed for the Department of Homeland Security (DHS). *See* Memorandum of Telephone Conversation between Clayton Ogilvie, FOIA Officer, and Shiwali Patel, Attorney-Examiner (Nov. 6, 2012). Accordingly, IOO does not possess the requested documents and it does not have any information concerning the “Work for Others” project that is the subject of the Appellant’s FOIA request. *Id.*

Upon the information provided by IOO, we are satisfied that the requested documents are not agency records as they were neither created, nor obtained, by IOO or any other DOE office. *See id.* IOO has stated that it did not create or obtain the information at issue. IOO indicated that as part of a “Work for Others” project that BEA performed for DHS, the information is owned by DHS and is in the possession of BEA, not IOO. The documents were created by BEA under the clause in its contract with IOO that allows it to do “Work for Others,” which, in this case, is DHS. DOE was not involved in the projects, other than they were conducted at the Idaho National Laboratory. Under clause I.15 of the contract and the DEAR, government-owned records are defined as “all records acquired or generated by the contractor *in its performance of this contract.*” DOE Contract No. DE-AC07-05ID14517, Clause I.15; DEAR § 970.5204-3, Clause I-15 (emphasis added). Thus, as the requested records were not generated by BEA in its performance of the contract between it and DOE, the records are not DOE records. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Action Appeal filed by the Appellant on November 1, 2012, OHA Case Number FIA-12-0070, is hereby denied.

(2) 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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Director
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Date: November 14, 2012