United States Department of Energy
Office of Hearings and Appeals

In the Matter of Oles, Morrison, Rinker, Baker LLP	)		
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Filing Date: April 3, 2014	)	Case No.:	FIA-14-0022
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Issued: April 22, 2014

Decision and Order

On April 3, 2014, the law firm, Oles, Morrison, Rinker, Baker LLP ("Appellant") filed an Appeal from a determination issued to the Appellant's client, Babcock Services, Inc. ("BSI"), by the Richland Operations Office (ROO) of the Department of Energy (DOE) (FOIA Request Number 2014-00265). In its Determination Letter, ROO 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. Specifically, the Appellant challenges the adequacy of ROO's search for responsive documents.

I. Background

On November 25, 2013, BSI submitted a FOIA Request to ROO requesting copies of ten items. *See* FOIA Request from Appellant to Dorothy Riehle, FOIA Officer, ROO (Nov. 25, 2013). ROO provided a partial response to the Appellant's FOIA Request on February 26, 2014, and its final response on February 27, 2014, providing a total of 259 pages of documents. On April 3, 2014, the Appellant filed the instant Appeal stating that the "primary issue is whether DOE adequately responded to BSI's request for '[a]ll documents relating to the solicitation, hire, or recruitment of BSI employees by CHPRC [CH2M Hill Plateau Remediation Company].'" *See* Appeal. Specifically, the Appellant complains that ROO did not provide copies of emails to and from individuals at BSI and CHPRC with @rl.gov email addresses, and that those emails should have been in the possession, control and custody of DOE at the time of its FOIA Request. *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard,* 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it

requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Project on Government Oversight*, Case No. TFA-0489 (2011).[1] In response to our inquiries, ROO explained that it assigned the Appellant's FOIA Request to its Procurement Division and the Office of the Chief Counsel as those offices would most likely have responsive documents. *See* Memorandum from Dorothy Riehle, FOIA Officer, ROO, to Shiwali Patel, Attorney Advisor, OHA (Apr. 15, 2014) ("ROO Memorandum"). ROO stated that "[t]he search was conducted by those within the agency who are most familiar with the subject matter of the request, in locations where documents would most likely be found," and that the searches were conducted electronically and manually. *Id.*

In addition, ROO maintains that the requested documents are not agency records and therefore, are not subject to the FOIA. 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 the FOIA's 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;
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> (2) The ability of the agency to use and dispose of the record as it sees fit;
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> (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).

With regard to the Appellant's request for records from the server @rl.gov, ROO maintains that the "requested records were generated by a server system operated, controlled and maintained by Mission Support Alliance (MSA), [ROO's] contractor, and have never been in the custody or control of DOE." *See* Email from John Dudley, Counsel, Office of Chief Counsel, ROO, to Shiwali Patel, Attorney Advisor, OHA (Apr. 16, 2014). ROO further explained that the requested emails and documents were never transmitted to the DOE and that the contractors who

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[1] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://www.energy.gov/oha.

maintain those emails and documents never intended to relinquish control over them. *See* ROO Memorandum. While the @rl.gov server is owned by DOE, MSA manages, maintains and provides email services to DOE and its contractors, including CHPRC. *See id.* ROO explained that "servers hosting the @rl.gov domain are operated and maintained by MSA for use by MSA and other contractors, including employees of such contractors, or in order to enable DOE's contractors to routinely access the server for email capability in the course of doing work for DOE on government contracts. DOE does not use the servers as part of its day-to-day business." *Id.* Thus, ROO claims that DOE "(1) has not accessed or relied upon the requested documents; (2) does not have the present ability to use or dispose of the documents; and (3) has not integrated the documents into the DOE's record systems or files." *See* ROO Memorandum at 3. Accordingly, in applying the four-factor test listed above and in consideration of MSA's maintenance and control of the @rl.gov email server, we conclude that DOE did not have control over the requested records at the time of the request, and therefore, those records are not 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).

ROO cited its contract with CHPRC, which includes an ownership of records clause that incorporates the DOE's Acquisition Regulation ("DEAR") 970.5204-3, to explain why the requested documents are contractor-owned. Section (b) of that clause identifies the following as "contractor-owned" records: employment-related records, confidential contractor financial information, correspondence between the contractor and other segments of the contractor located away from the DOE facility, and records relating to any procurement action by the contractor. Hence, ROO contends that the documents requested by the Appellant – "All documents relating to the solicitation, hire, or recruitment of BSI employees by [CHPRC]" – fit within Section (b)'s definition of contractor-owned records. *See* ROO Memorandum. We agree, as they pertain to procurement, employment, and correspondence between CHPRC and its subcontractor, BSI.

In sum, the additional requested documents from the @rl.gov server were not in the control or possession of DOE at the time of the Appellant's Request, as they were maintained and managed by MSA. Furthermore, pursuant to DEAR 970.5204-3, those records are contractor-owned and accordingly, are not subject to the FOIA. Hence, we conclude that ROO conducted an adequate search for responsive agency-records and accordingly, we will deny this Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on April 3, 2014,

OHA Case Number FIA-14-0022, 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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Poli A. Marmolejos
Director
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Date: April 22, 2014