United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Martin Pfeiffer	)	
		)	
Filing Date:	January 31, 2024	)	Case No.: FIA-24-0014
		)	
		)	

Issued: February 22, 2024

Decision and Order

On January 31, 2024, Martin Pfeiffer (Appellant) appealed a Determination Letter issued to him from the Department of Energy's (DOE) National Nuclear Security Administration's (NNSA) Office of the General Counsel (OGC) regarding Request No. 24-00017-KA, a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In its Determination Letter, OGC stated that its search discovered no responsive records. Appellant challenged the adequacy of the search. In this Decision, we deny the appeal.

I. PROCEDURAL BACKGROUND

On October 12, 2023, Appellant submitted a FOIA request seeking:

> As available and releasable, the current and past employment contracts between Sandia National Laboratories, and/or applicable sub-entity, and the current and immediately previous President and & [sic] CEO (and previously used titles) of the National Museum of Nuclear Science and History. The current President & CEO is Jennifer Hayden who is a Sandia employee. The previous director was Jim Walther (also a Sandia employee) who was director of the museum beginning in 1996. Please include all available contracts for Ms. Hayden. For Mr. Walther, please include their original employment contract as well as contract(s) covering and including the period of January 1, 2019 thru March 31, 2023.

Pfeiffer FOIA Request at 1 (Oct. 12, 2023). OGC sent an acknowledgement of receipt to Appellant on October 16, 2023, and informed him that due to the nature of the request, it would likely take longer than 20 days to complete the search. OGC Acknowledgement at 1 (Oct. 16, 2023). As part of the search, OGC analyzed the request to see where the requested records were most likely to be found. It determined that, pursuant to section I-20 of the National Technology & Engineering Solutions of Sandia, LLC (NTESS)-DOE Prime Contract (Prime Contract), which incorporates Department of Energy Acquisition Regulation 970.5204-3, the requested records were contractor-owned records owned by NTESS, a private corporation which manages and operates Sandia

National Laboratories. Sandia Field Office Search Request Memorandum at 1 (Nov. 9, 2023). On December 14, 2023, OGC sent Appellant a Determination Letter stating that no responsive agency records were located because any responsive records would be contractor-owned records. Determination Letter at 1–2 (Dec. 14, 2023).

On January 31, 2024, Appellant filed this appeal, arguing that the Determination Letter did not cite to the management and operations contract in effect in 1996, which he argued would govern whether the requested records created at that time were agency records. Appeal at 2 (Jan. 31, 2024). He further argued that if the requested employment contract was in DOE's possession, it would be an agency record. *Id.* In his appeal, he asked that "NNSA be directed to search for and provide [him] with releasable records and in particular the original employment contract for Mr. Walther from in or around the years 1996-1997." Appeal at 2.

II. ANALYSIS

When an agency denies a FOIA request, it is the agency's burden to justify its decision, showing that: (1) the responsive records are not agency records; (2) responsive agency records were not withheld; or (3) responsive agency records were properly withheld. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 232 (D.D.C. 2010) (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980)). An agency's search is adequate if it is reasonably calculated to uncover all relevant documents. *Inst. for Justice v. IRS*, 941 F.3d 567, 569–70 (D.C. Cir. 2019). In its Determination Letter, OGC asserted that records responsive to Appellant's request were not agency records because they are owned by NTESS and, therefore, its search yielded no responsive records.

Section I-20 of the Prime Contract states that:

> (a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, including records series described within the contract as Privacy Act systems of records, shall be the property of the Government and shall be maintained in accordance with 36 CFR, Chapter XII, Subchapter B, "Records Management." The contractor shall ensure records classified as Privacy Act system of records are maintained in accordance with FAR 52.224.2 "Privacy Act."
>
> (b) The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
>
> (1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee

> patient medical/health-related records, excluding records operated and maintained by the Contractor in Privacy Act system of records.
>
> Employee-related systems of record may include, but are not limited to: Employee Relations Records (DOE-3), Personnel Records of Former Contractor Employees (DOE5), Payroll and Leave Records (DOE-13), Report of Compensation (DOE-14), Personnel Medical Records (DOE-33), Employee Assistance Program (EAP) Records (DOE-34) and Personnel Radiation Exposure Records (DOE-35).

Prime Contract at 89–90 (Dec. 16, 2023) (available at https://www.energy.gov/nnsa/articles/snl-de-na0003525-contract). Section H-18 of the 1993 management and operations contract for Sandia National Labs, which was operative in 1996 and 1997, stated:

> (a) Government's Records. Except as is provided in paragraph (b) of this provision and as may be otherwise agreed upon by the Government and the Contractor, 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 settlement of this contract.
>
> (b) Contractor's Records. The following records acquired or generated by the Contractor in its performance of this contract (to the extent not listed and maintained as a Privacy Act record pursuant to the Section H provision entitled Privacy Act System of Records) are the property of the Contractor and not within the scope of paragraph (a), above:
>
> (1) Personnel records, medical records and files (excluding personnel radiation exposure records) maintained on individual employees, applicants, and former employees of the Contractor; . . . .

Email from Michelle Timm to Kristin L. Martin, *et. al.* (Feb. 16, 2024).

Contracts must be interpreted using the plain meaning of the words, and provisions must be interpreted so as to make them consistent. *Arko Exec. Servs. v. United States*, 553 F.3d 1375, 1379 (Fed. Cir. 2009); *Abraham v. Rockwell Int'l Corp.*, 326 F.3d 1242, 1251 (Fed. Cir. 2003). Prime Contract Section I-20(b) states that contractor-created "employment-related" records are contractor-owned and includes a non-exclusive list of employment-related records. The plain meaning of Section I-20(b) of the Prime Contract indicates that employment contracts created by contractors are contractor-owned records because they relate to employment by specifying terms such as the conditions, salary, start date, and benefits of employment. Furthermore, contractor-created employment contracts for former contractor employees are personnel records and, therefore, contractor-owned, which supports the categorization of current employment contracts as contractor-owned. Section H-18 of the 1993 management and operations contract explicitly states

that personnel records are contractor-owned.[1] For the foregoing reasons, we find that the requested records are contractor-owned.

It is well-established that contractor-owned records may be agency records subject to the FOIA. *Burka v. United States HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996); *Savannah River Site Watch*, OHA Case No. FIA-18-0039 at 4–5 (2018); *Ron Walli*, OHA Case No. FIA-19-0013 at 5–7 (2019). The Supreme Court has articulated a two-part test to determine whether a record is an "agency record." First, the agency must have created or obtained the record. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Records created by third parties, including contractors, may be considered created by the agency if the agency exercised so much supervision and control over the third party that it essentially created the record on the agency's behalf. *Burka*, 87 F.3d at 515. Second, the agency must have had control over the record at the time of the FOIA request. *Tax Analysts*, 492 U.S. at 145-46. Agency control over a record is not clearly defined, and courts examine "the totality of the circumstances surrounding the creation, maintenance, and use of the document to determine whether the document is in fact an 'agency record.'" *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d 1484, 1492-93 (D.C. Cir. 1984) (cited with approval *in Edelman v. SEC*, 172 F. Supp. 3d 133 (D.D.C. 2016)).

The D.C. Circuit has outlined factors to assist in determining whether the agency had control over the requested records at the time of the FOIA request: (1) the intent of the document's creator to retain or relinquish control over the records; (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 document; and (4) the degree to which the document was integrated into the agency's record system or files. *Burka*, 87 F.3d at 515. However, these factors are not an "inflexible algorithm" and "any fact related to the document's creation, use, possession, or control may be relevant." *Cause of Action Inst. v. OMB* , No. 20-5006, 2021 U.S. App. LEXIS 24901, at *8 (D.C. Cir. Aug. 20, 2021) (citing *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006)).

Turning to the first *Burka* factor, DOE did not create the employment contracts requested and does not maintain them because they are contractor-owned. Management and operations contractors are private corporations, and their employees are not DOE employees. While it is reasonable to assume that DOE has a record of who works for these contractors, DOE does not maintain the employment contracts for contractor employees. Email from Michelle Timm to Angelia Bowman, Kristin L. Martin, *et. al.*, at 1 (Feb. 15, 2024).

Turning to the second *Burka* factor, we examine the D.C. Circuit's factors. The Prime Contract defines the separation between NTESS employees and the federal government:

> In carrying out the work under this Contract, the Contractor shall be responsible for the employment of all professional, technical, skilled and unskilled personnel engaged by the Contractor in the work hereunder, and for the training of personnel. Persons employed by the Contractor shall be and remain employees of the Contractor and shall not be deemed employees of the NNSA or the Government.

[1] We note that any personnel records retained from 1993 would still be contractor-owned because DOE Acquisition Regulations state that "[t]his clause applies to all records created, received and maintained by the contractor without regard to the date or origination of such records including all records acquired from a predecessor contractor." 48 C.F.R. 970.5204–3(e). NTESS was not the management and operations contractor for the 1993 contract. Email from Michelle Timm to Kristin L. Martin, *et. al.*

Sec. J, Appx. A, Ch. III 3.0 Workforce Planning, Prime Contract at 175. This clause indicates NTESS's intent to retain control over its employment contracts. Furthermore, it indicates that DOE cannot use or dispose of NTESS's private employment contracts as it sees fit and does not rely on those contracts to carry out its work. As previously stated, there is no indication that DOE possesses the employment contracts, much less integrates them into its own records. DOE does not appear to exercise control over the requested records in any significant manner.

Neither *Burka* factor is satisfied here. Accordingly, we find that the employment contracts requested are not agency records subject to the FOIA.

III. ORDER

For the foregoing reasons, we find OGC properly considered the requested records to be contractor-owned and therefore not subject to the FOIA, rendering its search attempt adequate. It is hereby ordered that the Appeal filed on **Error! Reference source not found.**, by Martin Pfeiffer, No. FIA-24-0014, is denied.

This is a final order of the Department of Energy from 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 one's right to pursue litigation. OGIS may be contacted 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: https://www.archives.gov/ogis Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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