

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Savannah River Site Watch)

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Filing Date: July 25, 2024)

Case No.: FIA-24-0041

Issued: August 16, 2024

Decision and Order

Savannah River Site Watch (Appellant) appeals a final determination letter issued to them from the National Nuclear Security Administration (NNSA), Office of General Counsel, concerning Request No. FOIA 24-00133-R, 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 Determination Letter informed the Appellant that after conducting a search for responsive records, NNSA’s contractor, Savannah River Nuclear Solutions (SRNS) located records responsive to the request, but those records were considered contractor-owned records, which are not subject to release under FOIA. Determination Letter from NNSA to Tom Clements at 1 (June 13, 2024). In this appeal, the Appellant challenges the NNSA’s determination that the responsive records are not agency records that are subject to FOIA. Appeal Letter from Tom Clements to Office of Hearings and Appeals (OHA) at 1–13 (July 25, 2024). In this Decision, we deny the appeal.

I. Background

On January 23, 2024, the Appellant submitted a FOIA request to the NNSA seeking the following records: “[a]ny Tiger Team ‘reports’ – summary documents, memos, assessments, and documents on implementation of [Critical Decision (CD)]-3X packages – pertaining to the proposed Savannah River Plutonium Processing Facility (SRPPF), and attachments. This includes Tiger Team activities related to CD-2 and CD-3 activities.” FOIA Request at 1. In the FOIA request, the Appellant cited to an NNSA Performance Evaluation Report (PER)¹ of SRNS, the Management and Operating (M&O) contractor for the NNSA’s Savannah River Site (SR), which they claim confirmed the existence of responsive records. *Id.* at 1.

On June 13, 2024, the NNSA issued a Determination Letter, in which it notified the Appellant that upon receiving the FOIA request, it contacted the Savannah River Acquisition and Project

¹ In the FOIA request, the Appellant claimed “[t]he ‘Fiscal Year (FY) 2023 Performance Evaluation Summary’ (PER) for Savannah River Nuclear Solutions for the period October 1, 2022 – September 30, 2023, states that ‘for the SRPPF Project, SRNS executed the Construction Management subcontract, the Dismantlement & Removal (D&R) Critical Decision (CD)-3A activities, and Tiger Team implementation of CD-3X packages.’ NNSA has thus confirmed existence of Tiger Team activities in relation to the SRPPF.” FOIA Request at 1.

Management Office (NA-SV-APMO), within SR, and both the NA-SV-APMO and SRNS conducted a search for responsive records. Determination Letter at 1. The Determination Letter also notified the Appellant that after conducting a search:

NA-SV-APMO and SRNS identified records as pertinent to the scope of the request; however, those records are not government-owned records according to the Management and Operating (M&O) Contract between [SRNS] and the Department of Energy (DOE)/Savannah River Operations Office (DOE-SR) (DE-AC09-08SR22470) under Prime Contract Clause I-039: DEAR 970-5204-3 Access to and Ownership of Records (Oct 2014) [(Prime Contract)].

Id. at 1. The NNSA also notified the Appellant that SRNS maintains the records “as part of its own contractor procurement actions” and the search conducted “did not yield any agency owned records responsive to this request.” *Id.*

On July 25, 2024, the Appellant filed the instant appeal with OHA challenging the NNSA’s determination that the identified responsive records are contractor-owned. Appeal Letter at 1–13. In the appeal, the Appellant asserts that the “construction management subcontract” and “implementation of all Critical Decision packages” “may be, in part, carried out under NNSA supervision by the contractor SRNS but documents prepared for those activities by the NNSA-funded contractor and any subcontractor are generally NNSA documents.” Appeal Letter at 1. The Appellant also asserts that the NNSA did not provide evidence that the requested records are not owned by the government and that “Tiger Team documents may well be key ‘Government property’ in NNSA’s preparation of required ‘Critical Decision’ documents for the proposed SRS Plutonium Processing Facility, a project far too important and far too costly to be shielded from public assessment and review.” *Id.* at 2.

II. Analysis

The FOIA requires agencies to make publicly available records that are reasonably described in a written request, so long as those records are not exempt from disclosure. 5 U.S.C. § 552(a)(3)(A). In responding to a FOIA request, an agency must make a reasonable effort to search for “agency records” responsive to the request. *Id.* § 552(a)(3)(D). In its Determination Letter, the NNSA asserted that records it identified as responsive to the FOIA request were not agency records because they are owned by SRNS, and are therefore not subject to FOIA. Determination Letter at 1.

In the FOIA request, the Appellant sought copies of “reports – summary documents, memos, assessments, and documents” by the “Tiger Team,” related to a proposed Savannah River Plutonium Processing Facility, including “Tiger Team activities related to CD-2 and CD-3 activities.” FOIA Request at 1. SR is managed and operated by SRNS, under terms provided in the Prime Contract. Section I-039 of the Prime Contract, titled “DEAR 970.5204-3 Access To and Ownership of Records,” details the ownership of certain categories of records created by SRNS. This section states, in relevant part:

- (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 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.
- (b) Contractor-owned records. The following records are considered the property of the Contractor and are not within the scope of paragraph (a) of this clause ...
 - (3) Records relating to any procurement action by the Contractor, except for records that under 48 CFR 970.5232-3, "Accounts, Records and Inspection," are described as the property of the Government

Prime Contract at 46 (available at <https://www.energy.gov/sites/default/files/2019/09/f66/SRS-DE-AC09-08SR22470-SRNS-section-I.pdf>); see also 48 C.F.R. § 970.5204-3(b)(1).

The Prime Contract does not define what constitutes a "procurement action" by the contractor. When analyzing management and operating contracts to determine ownership of records for the purposes of FOIA, OHA has applied the definition of procurement used in the Federal Acquisition Regulations (FAR) as a guide in interpreting the contract clauses. See *Savannah River Site Watch*, OHA Case No. FIA-18-0039 at 3 (December 13, 2018).² The FAR defines "procurement," by referencing the term "acquisition," as follows:

...the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

48 C.F.R. § 2.101.

The "Tiger Team" referenced in the FOIA request consists of a group of individuals within SRNS that meets to brainstorm and support contracting activities at SR, by planning various projects at SR in accordance with the agency's project management guidelines and the DOE's acquisition management system. Memorandum of Telephone Conversation between NNSA SR Personnel & OHA (July 31, 2024). During the planning stages, SRNS personnel outside of the "Tiger Team"

² Decisions issued by OHA are available on the OHA website located at www.energy.gov/oha.

prepare draft records such as project schedules and site specifications, in the form of “packages,” that are used by SRNS to determine what subcontracts are needed to complete a project. Memorandum of Telephone Conversation between NNSA SR Personnel & OHA at 1 (August 1, 2024). Although the Tiger Team does not create any records, the NNSA identified records of “CD-3X activities,” that were pertinent to the Appellant’s FOIA request. Memorandum of Telephone Conversation between NNSA SR Personnel & OHA at 1 (August 13, 2024).

As for records of “CD-3 activities,” “CD-3” represents a distinct milestone, or performance baseline, toward completion of a capital project at SR. Telephone Memorandum at 1 (July 31, 2024); Telephone Memorandum at 1 (August 1, 2024). Records related to “CD-3 activities” are part of SRNS’s “long-lead procurement” strategy and contain information used to determine what equipment and services are needed at a specific point in the project, and what subcontracts SRNS needs to obtain the supplies and/or services necessary to complete the proposed SRPPF. Telephone Memorandum at 1 (August 13, 2024). The information contained in the records includes that which is necessary to balance the risks involved at distinct stages of the project, define the project’s scope, and calculate costs. Telephone Memorandum at 1 (July 31, 2024); Telephone Memorandum at 1 (August 1, 2024). Therefore, after applying the FAR’s definition of “procurement” to the records identified by the NNSA as responsive to the FOIA request, we find that they relate to procurement actions by SRNS under I-039 of the Prime Contract and are owned by SRNS.

Records that are owned by a contractor may be considered agency records subject to FOIA. The U.S. Supreme Court has articulated a two-part test to determine if a record is an “agency record” that is subject to FOIA. *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). First, the agency must have created or obtained the requested materials. *Id.* at 144. Second, “the agency must be in control of the requested materials at the time the FOIA request is made.” *Id.* at 145. The D.C. Circuit employs a four-part test to determine whether an agency was in control of the requested materials at the time a FOIA request was made:

- (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 v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996).

Considering this analytical framework, first, we find the NNSA did not create or obtain the records of CD-3X activities the NNSA identified as responsive to the Appellant’s FOIA request. NNSA personnel did not create the records of CD-3X activities it found responsive to the FOIA request. Telephone Memorandum at 1 (August 1, 2024). In addition, when the NNSA asked SRNS to search for the records responsive to the FOIA request, SRNS notified the NNSA that the records the NNSA identified as responsive were not owned by the NNSA and would not be given to the agency. Determination Letter at 1–2. Therefore, we find the NNSA did not create, and did not obtain the records responsive to the Appellant’s FOIA request.

Furthermore, we find that, after applying the *Burka* factors to records identified as responsive to the Appellant's FOIA request, the NNSA does not control the records to the extent required for them to constitute agency records subject to the FOIA. As to the first *Burka* factor, the intent of the document's creator to retain or relinquish control over the records, the NNSA's Determination Letter indicates that SRNS told the NNSA that they intended to retain control of the records, as contractor-owned, and would not produce them in response to this FOIA request. Determination Letter at 1.

As to the second *Burka* factor, the ability of the agency to use and dispose of the records, as mentioned above, the "Tiger Team" referenced in the FOIA request is not a part of the NNSA and the NNSA does not play a role in the group's activities. Telephone Memorandum at 1 (July 31, 2024). The NNSA does not possess records related to the "Tiger Team" and "CD-3 activities," and those records are not stored in NNSA record systems or files, so the NNSA is not able to use or dispose of the requested records. Telephone Memoranda at 1 (July 31, 2024); Telephone Memorandum at 1 (August 1, 2024).

As to the third *Burka* factor, the extent to which agency personnel have read or relied upon the records, the NNSA does not use or rely upon the records of CD-3X activities to perform NNSA functions. Telephone Memorandum 1 (August 1, 2024). Finally, as to the fourth *Burka* factor, the degree to which the document was integrated into the agency's record system or files, the NNSA does not possess or maintain records related to SRNS's "Tiger Team" or records related to "CD-3 activities," and those records do not exist in the NNSA's record systems. Telephone Memorandum at 1 (July 31, 2024); Telephone Memorandum at 1 (August 1, 2024).

Accordingly, we find that the records identified by the NNSA as responsive to the Appellant's FOIA request are not agency records subject to FOIA.

III. Order

It is hereby ordered that the appeal filed by Savannah River Site Watch, on July 25, 2024, Case No. FIA-24-0041, 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 the 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: ogis.archives.gov Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769
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