

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of John Vistica)

Filing Date: July 6, 2026)

Case No.: FIA-26-0047

Issued: July 20, 2026

Decision and Order

On July 6, 2026,¹ John Vistica (Appellant) appealed a letter issued by the Department of Energy’s (DOE) Idaho Operations Office (ID) regarding Request No. ID-2025-03966-F that he 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. In its determination letter, ID stated that “the requested materials are contractor-owned records and do not qualify as ‘agency records’” subject to FOIA. Determination Letter from ID to John Vistica at 4 (Apr. 6, 2026). Appellant challenged ID’s determination that the requested documents are not agency records. In this Decision, we deny the appeal.

I. BACKGROUND

On August 19, 2025, Appellant submitted the following FOIA request to ID related to a request for proposals (RFP) issued by a DOE contractor:

I request copies of each team’s completed summary document Data Product Document DPD-001 Fission Surface Power System Design Document as described in the solicitation’s Statement of Work (SOW) file '03165185 SOW 18960 Rev 1.pdf' with the following conditions: (1) Include the header and footer of each page. (2) Redact the main body text of each page. (3) If there is a title page, include the full title page but redact any exempt content. I also request all associated ‘metadata’ (i.e. document name, number, creation date, etc.) be provided for each DPD-001 document.

Id. at 1 (reciting Appellant’s initial FOIA request).

On September 22, 2025, ID issued a determination letter in response to Appellant’s FOIA request concluding that the records at issue were contractor-owned records under Battelle Energy Alliance’s (BEA) management and operating (M&O) contract for Idaho National Laboratory

¹ The Department of Energy’s (DOE) Office of Hearings and Appeals (OHA) received the Appeal on July 6, 2026, which is untimely pursuant to 10 C.F.R. § 1004.8(a). However, the Appeal contained supportive documentation that Appellant attempted to submit the Appeal on June 30, 2026, but it did not go through due to technological error. As such documentation was provided, OHA considers the Appeal as timely.

(INL) and therefore not subject to FOIA. Determination Letter from ID to John Vistica (Sept. 22, 2025). Appellant appealed ID's determination to DOE's Office of Hearing and Appeals (OHA) which dismissed the appeal as moot following ID's withdrawal of its September 22, 2025, determination letter. OHA Dismissal Letter at 1 (Dec. 19, 2025).

On April 6, 2026, ID issued a revised determination letter to supersede the September 22, 2025, determination letter. Determination Letter from ID to John Vistica at 4 (Apr. 6, 2026). The letter states that "the records [Appellant] requested relate to a procurement conducted exclusively by BEA under its Management and Operating Contract with [ID]" and therefore do not qualify as agency records subject to FOIA. *Id.* at 1–2; 5 U.S.C. § 552(a)(3)(A). Appellant challenges ID's determination that the requested records are not agency records subject to FOIA. Appeal Letter Email from John Vistica to OHA at 1–2 (July 6, 2026) (Appeal). Specifically, Appellant argues that "the determination letter only addressed whether the studies were DOE-owned while intentionally avoiding recognizing them as NASA-owned records" and because the requested records were "directed and funded by NASA for government business[,] [the records] are, therefore, government-owned records." *Id.* at 2. Appellant claims that because BEA was contracted by NASA to "administer the [FSP Phase 1 RFP] solicitation" and "manage and maintain the [requested records] as the official Custodian of Records," then the records are government owned. *Id.* Additionally, Appellant claims that because BEA is contracted by DOE to manage and operate INL, DOE must have ownership over the requested records. *Id.* at 6–7, 9, 12, 15.

On July 13, 2026, OHA consulted the contracting officer for Contract No. DE-C07-05ID14517 regarding whether the requested records are government or contractor owned. Email from Gregory Tomlinson to OHA at 1 (July 13, 2026). He opined that the RFP belongs to BEA under the M&O contract; therefore, any associated award documents, including the requested records, belong to BEA—not ID. *Id.*

II. ANALYSIS

"FOIA requires federal agencies to make agency records available to the public upon reasonable request." *ACLU v. CIA*, 823 F.3d 655, 661 (D.C. Cir. 2016). The term "agency records" only extends "to those documents that an agency both (1) creates or obtains, and (2) controls at the time the FOIA request is made." *Id.* (citations and punctuation omitted). At issue in this case is whether the requested records are agency records as a result of the M&O contract between BEA and DOE which authorizes BEA to manage and operate INL. We conclude that they are not.

DOE regulations provide that "[w]hen 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 possession of the Government or the contractor" 10 C.F.R. § 1004.3(b)(1). The M&O contract, which governs the contractual relationship between BEA and DOE, makes it clear that records related to procurement actions taken by the contractor are contractor owned. *See* Contract No. DE-C07-05ID14517, I.15(b)(3), <https://contracts.id.energy.gov/Contract/INLBasic> ("The following records are considered the property of the contractor . . . Records relating to any procurement action by the [c]ontractor, except for records . . . under 48 CFR 970.5232-3."). However, certain records related to procurement actions and mentioned in 48 C.F.R. § 970.5232-3 are government

owned. *See* 48 C.F.R. § 970.5232-3 (explaining that a contractor should maintain accounts and records related to the costs of the contract and that these records are the property of DOE). Therefore, to determine whether the requested records are contractor owned or government owned, we must first consider whether the requested records are related to procurement actions.

DOE's procurement process is strictly regulated by the Federal Acquisition Regulation (FAR) in addition to internal agency policies. *See generally* DEPT. OF ENERGY, DOE ACQUISITION GUIDE FY2026 VERSION 1 (Jun. 2026), <https://www.energy.gov/management/articles/departments-energy-acquisition-guide>. FAR provides the same definition for both "procurement" and "acquisition" which are defined as "the acquiring by contract with appropriated funds of supplies or services . . . by and for the use of the Federal Government" 48 C.F.R. § 2.101. Appellant requested "each team's completed summary document Data Product Document DPD-001 Fission Surface Power [(FSP)] System Design Document [(DPD-001)] as described in the solicitation's Statement of Work file '03165185 SOW 18960 Rev 1.pdf.'" Determination Letter at 1 (reciting Appellant's initial FOIA request). The Statement of Work (SOW) that Appellant references "establishes the tasks to authorize [BEA] to issue a Request for Proposal (RFP) for a Phase 1 design of a[n] [FSP] system with industry partners." Exhibit (Ex.) A1 at 3.² Issuing an RFP is a procurement action. *See Phillip Zwiefelhofer*, OHA Case No. FIA-15-0054 at 8 (2015) (finding that a copy of a request for proposal for elevator inspection services is related to a procurement action); *see also Jon E. Lux*, OHA Case No. TFA-0423 at 7 (2010) (finding that a contract resulting from an RFP was a procurement record of the contractor). Accordingly, the requested records, which were documents submitted in response to BEA's RFP, are related to a procurement action.

Next, we must consider whether the requested records are "government owned" as outlined in 48 CFR § 970.5232-3(d):

Except as agreed upon by the [g]overnment and the [c]ontractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the Contractor in connection with the work under this contract . . . shall be the property of the [g]overnment[.]

The DPD-001 is described in the SOW as "a written detailed narrative describing the FSP design elements including functionality and interconnectivity for subsystems." Ex. A1 at 8. Based on a plain reading of both definitions, DPD-001 documents do not fall under the "government owned" classification. *See* Email from Gregory Tomlinson to OHA at 1 (July 13, 2026). Even if the requested records were created or obtained by ID, they still fall short of being "agency records" because ID did not control them at the time the FOIA request was made. *See ACLU*, 823 F.3d at 661. The D.C. Circuit has identified four factors relevant to the determination of whether an agency exercises sufficient control over a document to render it an "agency record":

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;

² Appellant filed eleven exhibits which were labeled respectively as A1, A2, A3, B1, C1, C2, D1, E1, E2, E3, and F1.

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) (quoting *Tax Analysts v. DOJ*, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).

The M&O contract expressly states that BEA owns all records associated with procurement actions unless the records fall under a narrow exception, and there is no evidence to suggest that BEA intended to relinquish control over the records. In fact, BEA affirmatively declined to relinquish control of the requested records in response to ID's inquiry. Determination Letter at 4. The first factor supports a finding that ID does not have sufficient control over the requested records to render them as "agency records."

Moreover, ID does not have the ability to use and dispose of the requested records as it sees fit. Under 48 C.F.R. § 970.5204-3(d), which is incorporated into the M&O contract:

All records acquired or generated by the Contractor under this contract in the possession of the Contractor . . . shall be subject to inspection, copying and audit by the Government . . . at all reasonable times . . . provided, however, that . . . the Contractor shall deliver such records to a location specified by the Contracting Officer for inspection, copying, and audit.

See Contract No. DE-C07-05ID14517, I.15(d), <https://contracts.id.energy.gov/Contract/INLBasic> (quoting 48 C.F.R. § 970.5204-3(d)). Due to BEA's ownership of the requested records, ID cannot use and dispose the records "as it sees fit." While ID has the authority to inspect, copy, and audit the requested records, this falls far short of being able to dispose of the records as ID sees fit. The second factor thus further supports a finding that ID does not have sufficient control over the requested records to render them as "agency records."

Regarding the third factor, there is no evidence to suggest that ID personnel have seen the requested records, much less read or relied upon them. Appellant submitted documentation to demonstrate that NASA management has acknowledged receipt of the completed studies which may contain the requested records, but he did not provide any documentation to suggest that anyone from ID has read or relied upon them. Appeal at 7. Accordingly, the third factor also supports a finding that ID does not have sufficient control over the requested records to render them as "agency records."

As to the fourth and final factor, the requested records have not been integrated into the agency's record system or files. "It goes without saying that an agency cannot integrate into its record system a document created by a third party that none of its employees have read" *Judicial Watch, Inc. v. FHFA*, 646 F.3d 924, 928 (D.C. Cir. 2011). Nonetheless, ID conducted a thorough review of its system in response to Appellant's FOIA request, and no responsive records were identified. Determination Letter at 4. All four factors support the conclusion that ID does not have sufficient control over the requested records to render them as "agency records."

Lastly, regarding Appellant's claim that "the determination letter only addressed whether the studies were DOE-owned while intentionally avoiding recognizing them as NASA-owned records," DOE and NASA are two separate federal agencies independent of one another. Appeal at 2. DOE does not have the authority to make FOIA determinations on behalf of other federal agencies. *See* 10 C.F.R. § 1004.1.

III. ORDER

It is hereby ordered that the Appeal filed on July 6, 2026, by John Vistica, No. FIA-26-0047 is hereby 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: <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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