

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

In the Matter of: Tom Clements)
))
Filing Date: September 22, 2014) Case No.: FIA-14-0055
) _____)

Issued: October 14, 2014

Decision and Order

On September 22, 2014, Tom Clements (the Appellant) perfected an appeal of a determination that he received from the Department of Energy (DOE) Savannah River Operations Office (DOE-SR) in response to an August 12, 2014, request 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, DOE-SR released one of two requested documents, but concluded that the remaining document was the property of its contractor, Savannah River Nuclear Solutions, and, therefore, was not an “agency record” subject to disclosure under the FOIA. This Appeal, if granted, would require DOE-SR to release the withheld document.

I. BACKGROUND

Savannah River Nuclear Solutions (SRNS) is the management and operations (M&O) contractor at the DOE’s Savannah River Site (SRS) in Aiken, South Carolina. On August 12, 2014, the Appellant filed a FOIA request with DOE-SR for:

- (1) H-Canyon High Level Waste (HLW) Minimization Plan, August 2013;
- (2) Near-term Experimental Plan to Address Used Fuel Dissolution in H-Canyon, April 2014

See Letter from Lucy M. Knowles, DOE-SR, to Tom Clements (August 29, 2014) (Determination Letter). In response to the Appellant’s FOIA request, DOE-SR released the first requested document in its entirety.¹ However, DOE-SR stated that it “neither owns nor possesses” the second requested document. *Id.* Specifically, DOE-SR indicated that the

¹ The first requested document is not at issue in this Appeal.

document is a “contractor invention disclosure” record of SRNS, which the contract between the DOE and SRNS identifies as property of the contractor. Therefore, DOE-SR concluded that the document is not an “agency record,” subject to the FOIA. *Id.* The Appellant filed the instant Appeal with the DOE Office of Hearings and Appeals (OHA), disputing DOE-SR’s determination that the responsive record was not subject to disclosure under the FOIA. Letter from Tom Clements to OHA (received September 19, 2014) (Appeal). Specifically, he maintains that the FOIA applies to SRNS records because the DOE owns SRS and the contractor works for the Agency. *Id.*

II. ANALYSIS

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 FOIA requirements. The United States Supreme Court addressed this issue in *U.S. 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. 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;
- (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 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 & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996); *see also Ralph Stanton*, Case No. FIA-13-0048 (2013).²

In this case, there is no doubt that the document was not created or obtained by DOE-SR, but rather was generated by SRNS. In addition, based on the four-factor test noted above, we conclude that the document was not under DOE-SR’s control at the time of the FOIA request. While DOE-SR did have in its possession a copy of the document when it received Mr. Clements’ FOIA request, the document had been provided to DOE-SR by SRNS’ patent counsel “wholly for purposes of identification” in order to prevent an inadvertent disclosure of the document. *See Email from Pauline Conner, DOE-SR, to Diane DeMoura, OHA* (September 28, 2014). SRNS, the creator of the document, expressly did not have any intent to relinquish control over the document. In addition, there is no indication that DOE-SR has any ability to use or dispose of the document as it sees fit. Further, DOE-SR informed us that “no DOE-SR personnel read, reviewed, relied upon, or otherwise used” the document, and the document is

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

“not saved in any DOE-SR files or records.” *Id.* Based on these factors, we find that DOE-SR properly concluded that the requested document was not an “agency record” subject to disclosure under the FOIA.

Nonetheless, 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)(1). The contract between the DOE and SRNS states, in pertinent part, that “except as provided in paragraph (b) of this clause [“Contractor-owned records”], 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.” *See* DOE Contract No. DE-AC04-08SR22470 (Mod. M001), Part II, Section I, Clause I.39 (DEAR § 970.5204-3, “Access To And Ownership of Records”). The contract specifically identifies as property of the contractor certain records “maintained pursuant to the technology transfer clause” of the contract, including “patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.” *Id.* at Clause I.39(b)(5)(iii).

Applying the contract provisions to DOE-SR’s determination, it is clear that the requested document is the property of SRNS, not DOE-SR, and it is not considered a government record under the DEAR § 970.5204-3 (“Access To And Ownership of Records”). DOE-SR informed us that the document at issue was an attachment to a particular formal invention disclosure form “prepared and signed by the inventors and other key SRNS staff.” Email from Pauline Conner, DOE-SR, to Diane DeMoura, OHA (September 28, 2014). Pursuant to the contract between the DOE and SRNS, these documents remain property of SRNS until such time as the contractor relinquishes to the DOE its rights in the invention, which it has not done. Accordingly, we conclude that DOE-SR appropriately denied the Appellant’s FOIA request.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 22, 2014, by Tom Clements, OHA Case No. FIA-14-0055, 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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