

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

In the Matter of Philip Zwiefelhofer	)	
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Filing Date: September 28, 2015	)	Case No.: FIA-15-0054
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Issued: October 29, 2015

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**Decision and Order**

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On September 28, 2015, Mr. Philip Zwiefelhofer (Appellant) filed an Appeal from a determination issued to him by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. 15-00251-K). In that determination, NNSA responded to a request 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. This Appeal, if granted, would require NNSA to conduct an additional search for responsive information.

**I. Background**

On July 20, 2015, the Appellant filed a FOIA request with NNSA. Request from Appellant to NNSA dated July 20, 2015. In the request, he sought records regarding the contract to provide elevator inspection services to Los Alamos National Laboratory (LANL). *Id.* He stated that he sought the current contract, the request for proposal and any work orders under the contract. *Id.* He also indicated that his purpose was to obtain information identifying: (1) the name of the current contractor, (2) the start and end date of the contract, (3) the cost of the contract, (4) the number of elevators serviced under the contract, (5) the frequency of elevator inspections under the contract, and (6) the number of bidders on the contract. *Id.*

On August 28, 2015, NNSA issued a determination stating that it could locate no responsive records. Determination Letter from Jane R. Summerson, Denying Official, NNSA, to Appellant dated August 28, 2015. According to the determination, NNSA asked the Los Alamos Field Office (LAFO), which oversees LANL, to conduct a search of its records, but LAFO found no responsive documents. *Id.* The determination further observed that any responsive records would be in the possession and control of Los Alamos National Security, LLC (LANS), the management and operating contractor for LANL. *Id.* However, those records, the determination concluded, are not agency records subject to the FOIA, nor records available for release pursuant to the terms of the

contract between DOE and LANS. *Id.* Therefore, the determination concluded, any responsive records could not be obtained and released. *Id.*

In his Appeal, the Appellant argues that any responsive records held by LANS are DOE records under the contract between DOE and LANS. Appeal from Appellant to Director, Office of Hearings and Appeals (OHA), dated September 26, 2015.

## II. Analysis

This Appeal presents two main issues: (1) whether the search for responsive records conducted at LAFO was adequate under the FOIA, and (2) whether responsive documents held by LANS are agency records, thus requiring an additional search by LANS.

### A. Adequacy of Search at LAFO

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., Ralph Sletager*, Case No. FIA-14-0030 (2014).<sup>1</sup>

Although the Appellant did not specifically challenge the search for responsive records conducted at LAFO, we contacted NNSA to determine whether that search was adequate. NNSA informed us that all the contracting officers at LAFO performed electronic and manual searches of their records. E-mail from Geraldine Trujillo, LAFO, to Karen Laney, NNSA, dated October 6, 2015 (Trujillo E-mail I); E-mail from Geraldine Trujillo, LAFO, to Karen Laney, NNSA, dated October 19, 2015 (Trujillo E-mail II). In addition, LAFO’s records custodian performed a separate search of LAFO’s archived electronic records. Trujillo E-mail I; Trujillo E-mail II. Neither search revealed responsive documents. Trujillo E-mail I. Further, LAFO officials could identify no other document types that would have the information sought by the Appellant. *See* Trujillo E-mail I. LAFO stated, for example, that it does not maintain a list of LANS subcontractors. *Id.*

Based on the foregoing, we have determined that the search conducted at LAFO was reasonably calculated to uncover relevant documents and that no additional search at LAFO is necessary.

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<sup>1</sup> OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/office-hearings-and-appeals>.

## B. Records Held by LANS

We next consider whether, in addition to searching at LAFO, NNSA should require LANS to conduct a search for responsive documents.<sup>2</sup> At issue here is whether any responsive records held by LANS are agency records. Only agency records are subject to the FOIA. *See, e.g.*, 5 U.S.C. § 552(f) (defining the terms “agency” and “record”); 5 U.S.C. § 552(a)(3)(A) (each agency must make records available upon request); 5 U.S.C. § 552(a)(4)(B) (district courts may “enjoin the agency from withholding agency records”).<sup>3</sup>

The U.S. Supreme Court has adopted a two-part test to assist in determining whether a document is an agency record. *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In *Tax Analysts*, the Court found that documents are agency records 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 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* Donald A. Verrill, Case No. TFA-0364 (2010). As for the first part of the two-part test, based on the search at LAFO, we are satisfied that DOE did not create any responsive records or obtain them. Moreover, as to the third and fourth factors of the four factors regarding agency control, there is no evidence that agency personnel read or relied upon any responsive records or integrated any such records into their files. Essentially, the fact that DOE did not create or obtain responsive documents is a preliminary indicator that such documents are not agency records.

Nevertheless, a more complete analysis, particularly with respect to the first and second factors in the four-factor test, requires an examination of the contract between DOE and LANS. Although documents held by contractors may not be in the possession of an agency, the “[r]ecords of a nonagency can become agency records by contract.” *Gilmore v. Dep’t of Energy*, 4 F. Supp. 2d 912, 917 (N.D. Cal. 1998). In *Gilmore*, the Court concluded that “records that are contractually owned by the government are agency records regardless of whether they are physically in the government’s possession, because they have been obtained by the government and are within the

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<sup>2</sup> We learned that LAFO, when it received the request, did forward the request to LANS. Memorandum from Geraldine Trujillo, LAFO, to Karen Laney, NNSA, dated August 12, 2015. LANS responded that any responsive records it held would not be agency records subject to the FOIA. *Id.*

<sup>3</sup> We need not reach whether any responsive documents in LAFO’s possession would be agency records since no responsive documents were found at LAFO. However, given the likelihood that LANS possesses responsive documents, we consider it relevant to determine whether those documents would be agency records.

government's control." *Id.*; see also *Los Alamos Study Grp. v. Dep't of Energy*, No. CIV. 97-1412 DJS/WWD, 1998 WL 35487818, at \*5-7 (D.N.M. July 22, 1998) (records in possession of LANL contractor were agency records under the FOIA because contract established DOE's control). DOE's FOIA regulations, similarly, make it DOE policy to make records in the possession of a contractor publicly available if the relevant contract provides that those records are government property. 10 C.F.R. § 1004.3(e)(1).

In the instant case, the contract between DOE and LANS incorporates by reference a standard contract clause from DOE acquisition regulations. See DOE Contract No. DE-AC52-06NA25396, Part II, Section I, Clause I.78 (DEAR § 970.5204-3, "Access To And Ownership of Records"). That clause (Ownership of Records Clause), in Subsection (a), stipulates that all records held by the contractor are government records. 48 C.F.R. § 970.5204-3(a). However, in Subsection (b), the Ownership of Records Clause creates several exceptions, one of which states that any record related to a procurement action by the contractor is the property of the contractor. 48 C.F.R. § 970.5204-3(b)(3). Here, the Appellant seeks a copy of a subcontract for elevator inspection services, a request for proposal for such services and any work orders. We find that all of these requested records relate to a procurement action by LANS and so are LANS records, not DOE records, under the Ownership of Records Clause.<sup>4</sup>

The Appellant nevertheless contends that another provision in the Ownership of Records Clause, Subsection (d), defines any responsive records held by LANS as agency records. See Appeal. The provision he references gives DOE the ability to inspect, copy and audit any record held by the contractor, including records that are the property of the contractor under Subsection (b). See 48 C.F.R. § 5204-3(d). However, Subsection (d) is merely a right of access. It does not grant DOE control of any records in LANS's possession. See *id.*

We therefore have determined that the contract between DOE and LANS does not provide DOE the requisite control for the requested records to be considered agency records. Regarding the first factor in the four-factor test, LANS may reasonably expect that the requested records will remain under its control. As to the second factor, the contract's categorization of the records as LANS property indicates that DOE may not use or dispose of those records as it sees fit. Taking into account our earlier analysis of the third and fourth factors, we have been unable to identify any factors weighing in favor of treating the records as agency records. Accordingly, we conclude that LANS should not be required to conduct a search and that LAFO properly denied the Appellant's FOIA request.

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<sup>4</sup> The relevant provision in Subsection (b) states that contractor-owned records include "[r]ecords 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." 48 C.F.R. § 970.5204-3(b)(3). We note that this provision references another regulation that provides that "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, other applicable credits, and fee accruals under this contract, shall be the property of the Government . . . ." 48 C.F.R. § 970.5232-3(d). We find that such accounting records would fall outside the scope of the request and that the records sought by the Appellant would therefore be procurement-related records owned by LANS.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 28, 2015, by Mr. Philip Zwiefelhofer, Case No. FIA-15-0054, 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 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.

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Poli. A. Marmolejos  
Director  
Office of Hearings and Appeals

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