

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

In the Matter of: Ron Walli)
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Filing Date: April 17, 2019) Case No.: FIA-19-0013
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Issued: April 23, 2019

Decision and Order

On April 17, 2019, Ron Walli (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Oak Ridge Office (ORO) regarding Request No. ORO-2019-00373-F. In that determination, ORO responded to 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. ORO found no responsive documents for part of the request and determined that the documents responsive to the remainder of the request were not agency records subject to the FOIA. The Appellant challenged the determination that the responsive documents were not agency records. In this Decision, we deny the Appeal.

I. BACKGROUND

On December 27, 2018, the Appellant submitted a FOIA request for:

1. “A copy of the job posting for Oak Ridge National Laboratory/UT-Battelle communications director, which would have been made in late 2011 or early 2012. I’d like to know when the job was posted and for how long the posting was on line.”
2. “The job posting for the position of ORNL media manager, which as I recall listed qualifications not held by the person who was named to the position.”

Determination Letter at 1 (April 5, 2019). The request was forwarded to ORO for processing. *Id.* ORO performed a search and, on April 5, 2019, issued a Determination Letter to the Appellant in response to his request. ORO asserted that it had located no records responsive to Request 1. *Id.* It further asserted that the records described in Request 2 were contractor-owned records, pursuant

to Section I.126(b)(1) of UT-Battelle’s management and operations contract with DOE¹ (M&O Contract). *Id.*

On April 17, 2019, the OHA received the Appellant’s challenge to ORO’s Determination Letter. Appeal. The Appellant did not challenge the adequacy of ORO’s search for records responsive to Request 1, stating in his appeal that he did not believe such records ever existed.² *Id.* at 1. The Appellant challenged only ORO’s determination that records responsive to Request 2 were contractor-owned. *Id.* He made this challenge on the grounds that job postings were categorically not included in the types of records described by Section I.126(b)(1) of the M&O Contract. *Id.* He further argued that the job posting was posted on the UT-Battelle jobs website, which was “accessible to the world and is a public record.” *Id.*

The ORNL media manager position, the job posting which was the subject of Request 2, was a UT-Battelle contractor position. Memorandum of Telephone Conversation between ORNL Communications Directorate, UT-Battelle, and Kristin L. Martin, Staff Attorney, OHA (April 17, 2019). The job posting was listed on the UT-Battelle website, rather than the federal government’s USAJobs website. Job postings listed on the UT-Battelle website are created by UT-Battelle contractor employees. Memorandum of Telephone Conversation between Susan Noe, ORNL Human Resources Directorate, UT-Battelle, and Kristin L. Martin, Staff Attorney, OHA (April 17, 2019). The M&O Contract does not describe DOE control over hiring decisions, stating simply that “[t]he contractor shall be responsible for maintaining satisfactory standards of employee competency....” M&O Contract Section I.123(c). The M&O Contract also requires that UT-Battelle comply with various statutes with respect to its hiring practices. *See, e.g.*, M&O Contract Section I.1149 52.226-74, I.26 2.222-1, I.33 52.222-10. This indicates that DOE does not monitor or control the day-to-day hiring practices of UT-Battelle. The Appellant provides no evidence, and there is no reason to believe, that job postings stored on UT-Battelle’s jobs website are transferred to ORO for storage.

II. ANALYSIS

The FOIA is intended to ensure an informed citizenry, which is “needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). 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 withheld properly. *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)). In its Determination Letter, ORO asserted that the responsive records were not “agency records” eligible for FOIA release. For the following reasons, ORO’s assertions regarding “agency records” are justified.

The FOIA applies only to “agency records.” *Forsham v. Harris*, 445 U.S. 169, 178 (1980). As applied to the FOIA, the term “agency records” reaches beyond the scope of filing cabinets and hard drives housed inside government buildings. Much of the Government’s work is conducted by

¹ UT-Battelle, Inc., is a contractor that manages and operates DOE’s Oak Ridge National Laboratory (ORNL) facility at Oak Ridge, TN.

² “Also, for the record, please note that the job for ORNL communications director was never posted....” Appeal at 1.

contractors and public policy balks at a system that “would shield an agency from public scrutiny where the agency delegated sensitive assignments to independent contractors yet effectively created, obtained, and controlled the work.” *Chi. Tribune Co. v. U.S. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308, at *36 (N.D. Ill. Feb. 26, 1997).

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 v. U.S. Dep’t of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). 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 employs a four factor test 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 (citing *Tax Analysts v. Dep’t of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff’d on other grounds*, 492 U.S. 136).

In *Rocky Mountain Wild, Inc. v. United States Forest Service*, 878 F.3d 1258 (10th Cir. 2018), a requester sought records relating to a land exchange proposal. The Forest Service disclosed many documents, but refused to disclose documents in the possession of a contractor, and its subcontractors, that had not been shared with the Forest Service. *Id.* at 1260. The court held that the documents were not created or obtained by the Forest Service because the contractor had created the documents and never shared them with the Forest Service in the regular course of its official business. *Id.* at 1263. Furthermore, the fact that the Forest Service could have obtained the records upon request had no bearing on the fact that it did not obtain the records at any time. *Id.* The court affirmed the lower court’s *Burka* analysis, which found that the Forest Service did not control the documents at the time of the FOIA request. *Id.* The lower court based its finding on the fact that the Forest Service had not relied on the documents because it had not seen them, and the fact that the documents were never integrated into any Forest Service systems or files. *Rocky Mt. Wild, Inc. v. United States Forest Serv.*, 230 F. Supp. 3d 1245, 1250 (D. Colo. 2017).³

³ In some cases, records maintained at contractor sites have been considered under agency control when other factors, such as ownership, weigh in favor of agency control. *See, e.g., In Def. of Animals v. NIH*, 543 F. Supp. 2d 83, 100–01 (D.D.C. 2008) (“Applying the *Burka* factors, the court determined that the agency controlled the clinical records because their ownership had been transferred to the agency several years prior, the agency could access the clinical

The UT-Battelle M&O Contract states that employment-related records are owned by the contractor, specifically stating:

(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.

(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, except those records described by the contract as being operated and maintained by the Contractor in Privacy Act system of records;

M&O Contract. Citing this language, ORO asserts that the requested documents are not DOE records and are thus exempt from FOIA release. Appeal at 1. Though the contract does not specifically list job postings, its use of the phrase "such as" in the parenthetical suggests that the category list is non-exhaustive, as does its use of the phrase "and similar files." Job postings are easily classified as "employment-related" because they, quite literally, relate to employment. Furthermore, they are often included in personnel records of those hired to fill the postings. Accordingly, we conclude that the records responsive to Request 2 are contractor-owned.

However, ownership is not dispositive of whether a record is an "agency record" under the FOIA, and the government may not contract out of its obligations under federal law. *See Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 290 (D.C. Cir. 2006) ("[W]ith creation, possession, and control not dispositive in determining whether the calendars are 'agency records,' we must shift our attention to the manner in which the documents were used within the agency."); *Allen v. Dep't of Veterans Affairs*, 420 F. App'x 980, 987 n.4 (Fed. Cir. 2011) (citing *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1378 (Fed. Cir. 2001)). Moreover, DOE does not have the authority to create exemptions to the FOIA; if it unilaterally attempted to exempt contractor-owned records from FOIA release, such a clause would be contrary to existing law and, therefore, unenforceable. *Perez v. C.R. Calderon Constr., Inc.*, 221 F. Supp. 3d 115, 154 (D.D.C. 2016). Thus, we must use *Burka* and *Tax Analysts* to determine whether the records are agency records.

Because the requested record was created, maintained, and stored by UT-Battelle, we find that ORO did not create or obtain the requested record. According to the M&O Contract, UT-Battelle had no intent of relinquishing control of the record and ORO had no intent of owning it. It follows that ORO would not have read or relied on the record because it was irrelevant to ORO's mission; the incorporation of various labor statutes into the M&O Contract indicates that one of UT-

records at will, and the agency had received a commitment that the clinical records would be created and maintained on-site." Such is not the circumstance here, making cases like *In Def. of Animals* inapplicable.

Battelle's obligations is to conduct its own hiring. For these reasons, we find that ORO had no control over the requested record in December 2018 when the record was requested.

Following the D.C. Circuit's lead in *Consumer Federation of America*, we look at the creation, possession, and control of the record and find that UT-Battelle had all three. Shifting our attention to the agency's use of the record, we find that ORO had none. Therefore, we conclude that the requested record is not an "agency record" for purposes of the FOIA.

III. ORDER

It is hereby ordered that the Appeal filed on April 17, 2019, by Mr. Ron Walli, No. FIA-19-0013, 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

Poli A. Marmolejos
Director
Office of Hearings and Appeals