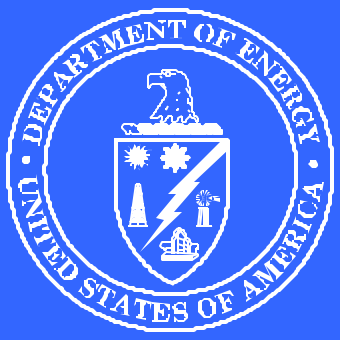
DOE/IG-0547

INSPECTION REPORT



U.S. DEPARTMENT OF ENERGY
OFFICE OF INSPECTOR GENERAL
OFFICE OF INSPECTIONS

INSPECTION OF THE LICENSING OF TRADE SECRETS BY SANDIA NATIONAL LABORATORIES

MARCH 2002

U.S. DEPARTMENT OF ENERGY
Washington, DC 20585

March 22, 2002

MEMORANDUM FOR THE SECRETARY

FROM: Gregory H. Friedman /s/
Inspector General

SUBJECT: INFORMATION: Inspection Report on "Licensing of Trade Secrets by Sandia National Laboratories"

BACKGROUND

The Office of Inspector General (OIG), U.S. Department of Energy (DOE), initiated an inspection into the facts and circumstances surrounding the issuance of a trade secret license in June 2000 by Sandia National Laboratories (Sandia) at Livermore, California, to Axsun Technologies (Axsun), a private company. This inspection was initiated after the OIG received allegations that the issuance of the Axsun license was in violation of both DOE policy and the requirements of Sandia's management and operating contract. It was alleged that Sandia had been advised for many years that DOE policy prohibited the national laboratories from creating, maintaining or marketing trade secrets. The allegation suggested that the licensing of trade secrets by Sandia had been prevalent over the years, and that the Axsun license was only the most recent in a history of willful misconduct by the laboratory.

The objectives of this inspection were to determine if: (1) Sandia violated the provisions of its management and operating contract and DOE policy by issuing trade secret licenses; (2) Sandia violated the DOE statutory mandate to widely disseminate the results of research and development at DOE facilities; (3) Sandia appropriately used the provisions of the Freedom of Information Act in justifying its trade secret activities; and (4) Sandia's actions exposed DOE to the potential risk of extensive liability.

RESULTS OF INSPECTION

Sandia created a form of intellectual property protection (i.e., a trade secret) not covered by any clause in its management and operating contract when it issued a trade secret license to Axsun Technologies, and when it issued trade secret licenses to 10 other companies since 1995. In issuing these licenses, Sandia licensed information and data owned by DOE without DOE's knowledge. In doing so, Sandia (1) disregarded DOE policy prohibiting the creation, maintenance, and licensing of trade secrets; and (2) disregarded DOE's statutory mandate to widely disseminate the results of research and development at DOE facilities. In commenting on a draft of this report, DOE management stated that Sandia was advised both verbally and in writing over the course of approximately 10 years that DOE policy prohibited the licensing of trade secrets.

Sandia's management and operating contract provides for the licensing of technical data and computer software first-produced by the contractor. However, the contract does not include any provision for the licensing of trade secrets or "Commercially Valuable Information." In fact, DOE has traditionally interpreted its statutory mandate to widely disseminate the results of research and development at DOE facilities as prohibiting the licensing of data "first-produced" at a laboratory as a trade secret. Sandia, by issuing trade secret licenses, assumed a licensable property right for Commercially Valuable Information that did not exist.

Sandia's trade secret licensing activities exposed DOE to the risk of releasing information or technical data without review for consideration of national security interests. Sandia's activities also exposed DOE to potential liability and the risk of legal action by a licensee in the event DOE were to disclose or release the technical information that was the subject of the trade secret. In addition, Sandia's trade secret activity may have resulted in the inappropriate collection of $617,422 in royalties on eight trade secret licenses issued since 1995. The costs incurred in connection with this unauthorized activity may be unallowable.

We recommended that all Sandia licenses that contain trade secret information be reviewed and a determination be made as to whether or not these licenses can be modified to comply with the management and operating contract, DOE policy, and the DOE statutory mandate. We also recommended a review of the collection and retention of trade secret royalty fees received by Sandia to determine if Sandia's actions resulted in an inappropriate augmentation of funds, and if these fees represented miscellaneous receipts that should have been deposited into the General Fund of the Treasury. In addition, we recommended that all Department laboratories be surveyed to determine if any facilities other than Sandia are inappropriately issuing licenses for trade secrets or Commercially Valuable Information.

MANAGEMENT REACTION

Management concurred with the recommendations and has initiated, or is in the process of initiating, appropriate corrective actions.

Attachment

cc: Deputy Secretary
Administrator, National Nuclear Security Administration
Under Secretary for Energy, Science and Environment
Deputy Administrator for Defense Programs
General Counsel
Manager, Albuquerque Operations Office
Director, Policy and Internal Control Management, NA-66

INSPECTION OF THE LICENSING OF TRADE SECRETS BY SANDIA NATIONAL LABORATORIES

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Overview

INTRODUCTION AND OBJECTIVES

The Office of Inspector General, U.S. Department of Energy (DOE), initiated an inspection into the facts and circumstances surrounding the issuance of a "trade secret license" by Sandia National Laboratories (Sandia) at Livermore, California, to Axsun Technologies (Axsun), a private company. Sandia issued the trade secret license, or what the laboratory calls a "Commercially Valuable Information" (CVI) license,[1] on June 5, 2000, to Axsun, a company that develops and manufactures photonic subsystems for telecommunications equipment manufacturers. Axsun paid Sandia $470,000 for the CVI license and associated software. The CVI sold to Axsun consisted of a manual on the LIGA process; a technology originated in Germany about 20 years ago, which derived its name from the German acronym for the three-stage production process (Lithography, Plating, and Molding).[2]

In December 2000, the Director, Sandia-California Legal and Patent Center, informed the DOE Assistant General Counsel for Technology Transfer and Intellectual Property that Sandia had issued a trade secret license to Axsun. The DOE Albuquerque Patent Counsel subsequently requested that Sandia provide a listing of all their trade secret licenses. In response to this request, Sandia's Chief Counsel for Intellectual Property provided DOE with a list of 10 trade secret licenses (not including the Axsun license) that had been issued by Sandia. Sandia's Chief Counsel reported that the first trade secret license was issued in 1994,[3] and that similar licenses were still being issued.

This inspection was initiated after the Office of Inspector General received allegations that the issuance of the Axsun license was in violation of both DOE policy and the requirements of Sandia's management and operating (M&O) contract. It was alleged that Sandia had been advised for many years that DOE policy prohibited the national laboratories from creating, maintaining or

[1] Sandia has repeatedly referred to its licenses as "trade secret licenses," so the terms "Trade Secret" and "Commercially Valuable Information" will be used interchangeably throughout this report. However, it should be noted that the General Counsel has taken the position that confusion is caused by using the terms "CVI" and "Trade Secret" interchangeably. General Counsel argues that, although technical data first-produced at a DOE laboratory is of similar character to and would be considered a "Trade Secret" if it were produced in the private sector, it should not be referred to as a "Trade Secret."

[2] LIGA is a process that uses synchrotron-based x-ray lithography to produce polymeric molds that are electroplated to produce small, precise metal parts. LIGA is an alternative to using semiconductor techniques for making microscopic parts because it allows the use of a variety of materials. Sandia's cutting-edge LIGA program grew out of a need to create small parts for defense applications.

[3] Sandia records show that the first trade secret license was issued in May 1995.

marketing trade secrets. The allegation suggested that the licensing of trade secrets by Sandia had been prevalent over the years, and that the Axsun license was only the most recent in a history of willful misconduct by the laboratory.

The objectives of this inspection were to determine if: (1) Sandia violated the provisions of its management and operating contract and DOE policy by issuing trade secret licenses; (2) Sandia violated the DOE statutory mandate to widely disseminate the results of research and development at DOE facilities; (3) Sandia inappropriately used the provisions of the Freedom of Information Act in justifying its trade secret activities; and (4) Sandia's actions exposed DOE to the risk of releasing technical data without a review for national security interests, and the potential risk of extensive liability.

OBSERVATIONS AND CONCLUSIONS

Sandia asserted a right to license a type of intellectual property protection (i.e., a trade secret) not recognized or covered by any clause in its management and operating contract when it issued a trade secret license to Axsun Technologies in June 2000, and when it issued trade secret licenses to 10 other companies since 1995. In issuing these licenses, Sandia licensed information and data owned by DOE without DOE's knowledge or approval. In so doing, Sandia: (1) disregarded DOE policy prohibiting the creation, maintenance, and licensing of trade secrets; (2) disregarded DOE's statutory mandate to widely disseminate the results of research and development at DOE facilities; and (3) improperly used the provisions of the Freedom of Information Act in an attempt to justify their issuance of trade secret licenses.

Sandia's management and operating contract provides for the licensing, under certain circumstances, of technical data and computer software first-produced by the laboratory. However, the contract does not include any provision for the licensing of trade secrets or Commercially Valuable Information first-produced by Sandia. The only reference to a trade secret in Sandia's contract is for data produced as a result of research and development activities conducted under a Cooperative Research and Development Agreement (CRADA)[4] and licensed to a third party.[5] In fact, the Department has traditionally interpreted the Department's statutory mandate to widely disseminate the results of research and development at DOE facilities as prohibiting the licensing of data

[4] CRADA's are specifically referenced under DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (n)(3)(iii), "Technology Transfer Through Cooperative Research and Development Agreements."
[5] Data first-produced under a CRADA would be considered a trade secret if it had been obtained from a non-Federal third party.

"first-produced" at a Laboratory as a trade secret. Sandia, by issuing trade secret licenses, assumed a licensable property right for Commercially Valuable Information that did not exist.

Rather than working with DOE to identify a viable mechanism for the protection and dissemination of this type of intellectual property, Sandia chose not to disclose its activities. Once DOE learned of Sandia's trade secret licensing activities, Sandia attempted to justify its actions through its own interpretations of the contract, DOE policy, and the provisions of the Freedom of Information Act. As a result, we concluded that Sandia's trade secret licensing activities substantially weakened the cooperative relationship that had existed between DOE and Sandia in the technology transfer area.

Sandia's trade secret licensing activities exposed the Department to the risk of releasing information or technical data without review for the consideration of national security interests. This is especially troubling given that DOE was unaware of the existence of the license, and, therefore, had no opportunity to review the technical data for national security concerns. Sandia's activities also exposed the Department to potential liability and the risk of legal action by a licensee in the event the Department were to disclose or release the technical information that was the subject of the trade secret.

In addition, Sandia's trade secret activity may have resulted in the inappropriate collection of $617,422 in royalties on eight trade secret licenses issued since 1995. Sandia is only allowed to retain royalties as a result of the performance of authorized technology transfer activities. Since Sandia's trade secret licenses did not represent an authorized technology transfer activity, the question is raised as to whether Sandia inappropriately augmented its funds in violation of the Department of Energy Acquisition Regulations (DEAR); and whether Sandia should be allowed to retain the royalties associated with these licenses. In addition, since the licensing of trade secrets was not performed in accordance with the terms of Sandia's management and operating contract, the costs incurred in connection with this unauthorized licensing activity may be unallowable.

Sandia claimed that they used the CVI protection solely to make information that cannot be patented more attractive to industry. Sandia also claimed that CVI licensing was not about money, but about creating value for DOE programs and industry. However, in the case of the Axsun trade secret license, Sandia received

$400,000 for the CVI and $70,000 for software associated with the CVI. Sandia used the license to facilitate the transfer of two Sandia employees to Axsun in a manner that created the appearance of a conflict of interest.

When informed of Sandia's action in this area, the DOE Contracting Officer directed Sandia to suspend any further trade secret licensing activity. However, it is clear that there is commercially valuable technical information being developed by the national laboratories that cannot be licensed under existing DOE policy or contract provisions. We concluded that the Department should review the concept of licensing this type of technical information, and determine if there are licensing mechanisms that do not compromise DOE policy and its statutory mandate.

Details of Findings

Sandia's Adherence to Management and Operating Contracting Provisions

The Sandia management and operating contract contains clauses on Rights in Data-Technology Transfer, Patent Rights, and the Technology Transfer Mission. Under this contract, DOE has "Ownership of all technical data and computer software first-produced in the performance of the contract," including the right to have delivery of any such computer software and technical data. The Intellectual Property protections in the contract include copyright for technical data, software and mask works,[6] patents or patent applications, as well as protected CRADA information. Sandia is allowed to license protected "Intellectual Property" only in accordance with the terms and conditions of the contract.

The only reference to treating first-produced data as a trade secret in Sandia's management and operating contract is under DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (n), "Technology Transfer Through Cooperative Research and Development Agreements," PART (3)(i), Withholding of Data. This clause states that certain data first-produced under a CRADA that would be considered a trade secret if it had been obtained from a non-federal third party, may be protected from disclosure under the Freedom of Information Act (See Appendix II). Under the CRADA provisions, the contractor is authorized to enter into licensing agreements with third parties for data developed by the contractor under a CRADA as long as the contractor does not use the protection against dissemination nor the licensing of data as an alternative to the submittal of invention disclosures.

Sandia's Trade Secret Licenses Not Covered by the Management and Operating Contract

Sandia's management and operating contract contains no provision for the licensing of first-produced data as trade secrets or Commercially Valuable Information except under a CRADA.[7] Sandia's Chief Counsel for Intellectual Property took the position that the contract did not prohibit the licensing of trade secrets. The Chief Counsel referenced the Technology Transfer clauses in the management and operating contract and stated that the contract expected that the contractor would use all of the mechanisms available to it to accomplish the Technology Transfer mission. However, the DOE Albuquerque Patent Counsel said that the provisions in the Sandia contract specify what the laboratory is

[6] Mask Works are defined as a series of related images, however fixed or encoded (1) having or representing the predetermined three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from layers of a semiconductor chip product; and (2) in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product.

[7] Neither the Axsun trade secret license nor the majority of the trade secret licenses issued to the 10 other companies involved CRADA data.

allowed to do, and that the laboratory's right to license trade secrets is not specified within the contract.

The DOE Albuquerque Patent Counsel's position was supported by DOE's Assistant General Counsel for Technology Transfer and Intellectual Property, the Deputy Assistant General Counsel for Litigation, the former Assistant Chief Counsel for Intellectual Property, the DOE-Albuquerque Branch Chief for Technology Partnerships, and the DOE-Albuquerque Patent Reviewer for Defense Programs. In a memorandum dated July 27, 2001, the Contracting Officer directed Sandia's Vice President, Business Management and Chief Financial Officer, to suspend any further licensing efforts, any pending licensing agreements, and the issuance of any new licenses agreements of "know-how," CVI, or trade secrets without the expressed written approval of the Albuquerque Patent Counsel.

Sandia's Assertion of Copyright Was Not Approved by DOE

Sandia included two copyright packages in the Axsun license that were not approved by DOE as required by the management and operating contract. Specifically, Sandia included a Scanner Control Software and a Plating Tank Control Software in the Axsun license that were not approved by DOE. The management and operating contract states that the contractor shall submit in writing to the DOE Patent Counsel its request to assert copyright on data first-produced in the performance of the contract. The Director of Sandia-California's Legal and Patent Center said that this omission was inadvertent, and that it was his understanding that the items were "in the process for DOE approval." However, at the conclusion of this inspection, Sandia had yet to submit its request to assert copyright in these two instances.

Sandia's Adherence to Department Policy on Trade Secret Licenses

On April 17, 1998, the DOE Assistant General Counsel for Technology Transfer and Intellectual Property signed a memorandum which outlined the Department's policy on trade secret licensing. This memorandum stated that some contractors may have established the practice of granting licenses in technology that was not covered by Intellectual Property protections such as copyright for software and mask works or patents and patent applications for inventions or statutorily recognized licensable material, such as protected CRADA information. It stated that the practice amounted to the "licensing of know-how and the creation and maintenance of trade secrets." The memorandum also stated that there was no basis in law for a contractor to claim such protection of data, and that any licensing of unprotected information was strictly against DOE policy and

violates the DOE statutory mandate to widely disseminate results of research and development efforts at the DOE facilities. Sandia had possession of the April 17, 1998, memorandum as early as June 1998. In addition, prior to the issuance of this memorandum, the Albuquerque Patent Counsel and the Assistant General Counsel for Technology Transfer and Intellectual Property had advised Sandia repeatedly that they were not entitled to grant trade secret protection for Federally funded research.

Sandia Disregarded the Department's Policy on Trade Secret Licenses

Despite being advised by DOE, both verbally and in writing, Sandia disregarded the Department's policy on trade secret licenses. In fact, Sandia issued six of their reported 11 trade secret licenses after the April 17, 1998, memorandum.

According to the DOE Assistant General Counsel for Technology Transfer and Intellectual Property, the April 17, 1998, memorandum served as DOE's interpretation of the law. The Assistant General Counsel stated that, in the past, if there were disagreements, the laboratories would challenge his interpretations through a letter or phone call. However, he said that, instead of challenging the interpretation on trade secret licensing, Sandia ignored the April 17, 1998, memorandum.

Sandia provided us a document dated June 15, 1998, and marked as an "Attorney Work Product." In the document, Sandia analyzed the April 17, 1998, memorandum and the issue of whether Sandia could license Commercially Valuable Information. Sandia concluded that "Neither Sandia's M&O Contract, nor statute, nor regulation creates an express prohibition against CVI, generally, and the contract does permit licensing of CRADA information." However, Sandia did not use this analysis to open any discussion with DOE on the legitimacy of CVI licensing, and did not challenge DOE on the policy contained in the April 17, 1998, memorandum.

According to Sandia's Chief Counsel for Intellectual Property, the April 17, 1998, memorandum was not part of the contract. He said that the memorandum would have to be transmitted via a Contracting Officer before Sandia would be required to follow it. He said that, since this was not done, the April 17, 1998, memorandum was not applicable to Sandia. He stated that the memorandum was from one DOE Patent Counsel to other DOE Patent Counsels. The Chief Counsel said Sandia did not hide the issuance of licenses, nor did they advertise their licenses. He said it was simply business as usual. The Chief Counsel said Sandia did not need to tell DOE that they were not going to follow the

guidance in the 1998 memorandum. He believed that the memorandum was not relevant and not binding. The Director, Sandia-California Legal and Patents Center, expressed a similar disregard for the April 17, 1998, memorandum.

However, the former DOE Contracting Officer for the Sandia management and operating contract said that Sandia is picking and choosing the guidance it wants to use. She said that Sandia has the obligation to go to DOE if it needs clarification.[8] The current DOE Contracting Officer informed Sandia in a July 27, 2001, memorandum that its practice of trade secret licensing was contrary to express DOE policy and instructions as set out in the April 17, 1998, memorandum. As stated earlier in the report, the Contracting Officer directed Sandia to suspend any further licensing efforts, any pending licensing agreements, and the issuance of any new licenses agreements of "know-how," CVI, or trade secrets without the expressed written approval of the Albuquerque Patent Counsel.

Sandia Claimed Policy Was Obsolete

Sandia also claimed that stockpile requirements of the National Nuclear Security Administration (NNSA) made the April 17, 1998, memorandum obsolete. The Director, Sandia-California Legal and Patent Center, stated that "We have carefully weighed the April 1998 memo. Whatever its vitality then, it now seems largely obsolete in view of NNSA requirements for the stockpile of the future." However, Section 3296 of Title XXXII of the National Defense Authorization Act for Fiscal Year 2000 establishing the National Nuclear Security Administration does not support this position. Section 3296 states that "Unless otherwise provided in this title, all provisions of law and regulations in effect immediately before the effective date of this title that are applicable to functions of the Department of Energy specified in Section 3291 [functions transferred] shall continue to apply to the corresponding functions of the Administration." In addition, the Acting Director for DOE's Defense Programs' Systems Engineering and Manufacturing Division said there has not been a radical change to Defense Programs' mission that would make any guidance obsolete.

[8] This position is consistent with FAR 43.104, which states that when a contractor considers that the Government has effected or may effect a change in the contract that has not been identified as such in writing and signed by the Contracting Officer, it is necessary that the contractor notify the Government in writing as soon as possible.

The Department's Statutory Mandate to Widely Disseminate the Results of Research and Development at DOE Facilities

The Department of Energy has a mandate to widely disseminate the results of research and development at DOE facilities. This mandate first appears in the Atomic Energy Act of 1954. Section 12 of the Atomic Energy Act states that it is DOE's responsibility to disseminate scientific and technical information. The Atomic Energy Act also states that no arrangements shall contain any provisions or conditions which prevent the dissemination of scientific or technical information except to the extent such dissemination is prohibited by law. Similar provisions are found in the Energy Reorganization Act of 1974 (see Appendix II) and the Federal Nonnuclear Energy Research and Development Act of 1974. These principles are also restated in the 1977 Department of Energy Organization Act, where the scope of the subject matter was extended from atomic energy to all energy sources.

Sandia's Actions Were Not Consistent With the Department's Statutory Mandate to Widely Disseminate the Results of Research and Development at DOE Facilities

Sandia's actions were not consistent with the Department's statutory mandate to widely disseminate the results of research and development at DOE facilities. Sandia created an unauthorized form of intellectual property protection (i.e., a trade secret) not covered by any management and operating contract clause or statute.

Sandia's Chief Counsel for Intellectual Property claimed that he did not know of a DOE statutory mandate to widely disseminate the results of research and development efforts at DOE facilities. The Director, Sandia-California Legal and Patent Center, said the DOE Assistant General Counsel's position in the April 17, 1998, memorandum was taken seriously, but that Sandia believed that it was legal to issue trade secret licenses. He said the requirement to widely disseminate the results of research and development efforts at DOE facilities was a high-level statement of one of DOE's missions. He said he believed that the statement means that DOE is not supposed to generate information and hold it. He stated that trade secret licensing is consistent with the mission statement in carrying out the statutory goal, and that the only reason Sandia created trade secret licenses was to disseminate information. The Director contends that the Assistant General Counsel's position in the April 17, 1998, memorandum inhibited Sandia from using the authority that the regulations provided.

In the June 15, 1998, document marked as "Attorney Work Product," Sandia concluded the language in the Federal Nonnuclear Energy Research and Development Act of 1974, which allowed the Administrator of the Energy Research and Development Administration to make the benefits of energy research, development and demonstration program widely

available to the public in the shortest practical time, was different from stating an explicit obligation to widely disseminate results of research and development efforts. The "Attorney Work Product" document also stated that the statute provided a methodology for making waiver decisions, and not an independent mandate to disseminate information. This document stated that the statute did not provide a specific mandate of the nature and scope suggested by the April 17, 1998, memorandum.

However, Sandia's interpretation was not consistent with DOE policy regarding the licensing of trade secrets.[9] DOE's April 17, 1998, memorandum clearly stated that licensing of trade secrets would violate the DOE statutory mandate to widely disseminate results of research and development efforts at DOE facilities. In addition, the Office of Management and Budget, under OMB Circular A-130, requires that agencies avoid establishing, or permitting others to establish on their behalf, exclusive, restricted, or other distribution arrangements that interfere with the availability of information dissemination products on a timely and equitable basis. The DOE Assistant General Counsel for Technology Transfer and Intellectual Property developed policy on trade secrets consistent with the Department's statutory mandate. Sandia disregarded that policy when it entered into the Axsun and other trade secret licenses.

Sandia's Use of the Provisions of the Freedom of Information Act to Justify Their Trade Secret Licensing Activities

The DOE regulations implementing the Freedom of Information Act are contained in 10 Code of Federal Regulations (C.F.R.) Part 1004. Part 1004 provides information concerning the procedures under which members of the public may request records from all DOE offices excluding the Federal Energy Regulatory Commission. Section 1004.3(e)(2) states that contractor records owned by the Government that contain information or technical data having commercial value[10] "shall be made available only when they are not in the possession of the Government and not otherwise exempt under 5 U.S.C. [United States Code] 552(b)." Section 1004.3(e)(3) affirms DOE's rights to control the disposition of all technology and information and to request from the contractor any records owned by DOE (see Appendix II).

[9] Sandia's management and operating contract states that a Contracting Officer shall be the only individual on behalf of the Government to waive any requirement of the contract, or to modify any term or condition of the contract.

[10] For purposes of § 1004.3 (e)(2), "technical data and information having commercial value" means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certified to DOE would cause competitive harm to the commercial value or use of the information data.

Sandia Assumed a Licensable Property Right for Commercially Valuable Information that Did Not Exist

Sandia took the position that the Freedom of Information Act allowed it to license Commercially Valuable Information and protect the information from public disclosure. However, Sandia's issuance of trade secret licenses assumed a licensable property right for Commercially Valuable Information that did not exist. The DOE regulations that implement the Freedom of Information Act (FOIA) only reference Commercially Valuable Information in the context of when contractor records that contain information or technical data having commercial value shall be made available to members of the public under a FOIA request. The Department's FOIA regulations do not express or imply the right to license Commercially Valuable Information. The DOE FOIA regulations recognize DOE's right under contract to obtain any contractor records DOE owns and to determine their disposition, including public dissemination (see Appendix II). Sandia did not allow for DOE's rights to obtain the information or technical data contained in the trade secret licenses, and disregarded DOE's right to determine the disposition of this information or technical data.

Sandia's Actions Created Two Potential Risks to the Department

Sandia's issuance of trade secret licenses has created two potential risks to the Department. First, the information included in the trade secret licenses was not reviewed by DOE to determine if the information should be releasable. Under recognized forms of intellectual property protection, there are processes in place where the information is reviewed to determine if the information should be releasable. For example, with regard to inventions funded by Defense Programs, Sandia or the inventor employee are required to provide to DOE Patent Counsel a supporting statement addressing whether: (1) national security will be compromised by licensing; (2) sensitive technical information under the nuclear weapons program or other defense activities of DOE will be released to unauthorized persons; and (3) there is export controlled material and how such material will be protected.[11] The election to retain title to Defense Programs funded inventions is subject to the independent concurrence of a designated Defense Programs Military Applications Field Program official and approval by DOE Patent Counsel.

The information and technical data included in the Axsun license were developed under Defense Programs funding. In the case of the Axsun license, Sandia states that "Without CVI protection, DOE's LIGA information would be available to foreign economic and military adversaries." Sandia also stated that "The LIGA records comprise recipes for producing small parts," and that "We

[11] The requirement regarding Defense Programs inventions reflects the statute requiring such special treatment. See 35 U.S.C. 202 (a)(iv).

will transfer these recipes to Kansas City for weapons components." However, the information included in the Axsun license was not reviewed by the DOE Patent Counsel or Defense Programs officials under the process required for Defense Programs funded inventions. While the information provided to Axsun might not constitute an invention, there was no process that would have allowed the Department an opportunity to determine under what conditions, if any, the information should be released. By creating a form of intellectual property protection (i.e., a trade secret) not covered by any contract clause, and by not disclosing its trade secret licensing activity to DOE, Sandia created the risk of allowing information or technical data to be released that was not reviewed by DOE for consideration of national security interests.

In addition, Sandia created a potential liability on behalf of the Government in violation of the management and operating contract. Specifically, the Patent Rights Clause states that "the Contractor shall not include in any license agreement or assignment, any guarantee or requirement which would obligate the Government to pay any costs or create any liability on behalf of the Government." By issuing the Axsun license, Sandia attempted to "guarantee" that DOE would not release the technical information that made up the trade secret. This guarantee was made without the concurrence or knowledge of DOE. Because DOE owns the information or data included in the trade secret licenses, DOE may be placed in a position where it must release the information or technical data as a result of a request from Congress, the General Accounting Office, the Office of Inspector General, or under FOIA. If DOE were to release the information or technical data included in the trade secret licenses, DOE could risk legal action by licensees for breaching the trade secret license agreements.

The Collection of Royalties on Trade Secret Licenses Are Questionable Under the Management and Operating Contract

Since 1995, Sandia has collected and retained royalties on at least eight trade secret licenses that were not authorized by the Department, and that were not consistent with the provisions of the management and operating contract and DOE policy. The fees collected on these licenses totaled $617,422. Under DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (h), "Disposition of Income," "Royalties or other income earned or retained by the Contractor **as a result of performance of authorized technology transfer activities** [emphasis added] herein shall be used by the Contractor for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory…."

DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (h), "Disposition of Income," also states that "Under no circumstances shall these royalties and income be used for an illegal augmentation of funds furnished by the U.S. Government."

However, royalties received by Sandia pursuant to trade secret licenses did not result from the performance of an authorized technology transfer activity. Since there was no statutory, contractual, or other authority for Sandia to enter into trade secret licenses, the question is raised as to whether Sandia inappropriately augmented its funds, contrary to the DEAR. The Department of Energy Chief Financial Officer's Accounting Handbook[12] states that, as a general rule, all collections received by DOE shall be deposited as miscellaneous receipts into the General Fund of the Treasury unless otherwise authorized by statute or under other provisions of the Accounting Handbook. It also states that retaining and using collections that DOE should have deposited as miscellaneous receipts is an augmentation of DOE's appropriation. We concluded that the Department needs to review the collection and retention of the trade secret licensing fees received by Sandia, and determine if Sandia should be allowed to retain these fees, or be required to deposit the $617,422 into the General Fund of the Treasury.

Sandia's Trade Secret Activities May Have Resulted in Unallowable Costs

Sandia's trade secret licensing activity may have resulted in unallowable costs under their management and operating contract. Sandia incurred the costs of preparing and negotiating at least eleven trade secret licenses. Under DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (c), "Allowable Costs," the costs associated with the conduct of technology transfer shall be deemed allowable provided that such costs meet the requirements of the allowable cost provisions of the contract. DEAR 970.5204-13, ALLOWABLE COSTS, AND FIXED-FEE (MANAGEMENT AND OPERATING CONTRACTS), Subsection (c), "Allowable Costs," states that the allowable costs of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms.

However, the licensing of trade secrets was not performed in accordance with the terms of the management and operating

[12] The Chief Financial Officer's Accounting Handbook is made part of the Management and Operating Contract under DOE Order 534.1 which states that "In addition to all specific rules and requirements related to the establishment and maintenance of an integrated accounting system, the contractor shall follow the procedures as specified in the Department of Energy's Chief Financial Officer's Accounting Handbook."

contract. In fact, Sandia was informed by the DOE Contracting Officer on July 27, 2001, in a memorandum to the Sandia Vice President, that Sandia's practice of trade secret licensing was contrary to express DOE policy and instructions as set out in the April 17, 1998, memorandum. The Contracting Officer directed Sandia to suspend any further licensing efforts, any pending licensing agreements, and the issuance of any new licenses agreements of "know-how," CVI, or trade secrets without the expressed written approval of the Albuquerque Patent Counsel. Given the contract language on "ALLOWABLE COSTS," and the position taken by the Contracting Officer, the costs incurred in connection with this unauthorized licensing activity may be unallowable. We concluded that the Department should determine if the costs associated with Sandia's trade secret licensing activity are unallowable.

Trade Secret License Issued to Facilitate Transfer of Sandia Employees Without Adequate Conflict of Interest Determination

The Axsun trade secret license was issued, at least in part, to facilitate the transfer of two Sandia scientists[13] to Axsun. According to the two former Sandia employees, they signed letters of intent to work for Axsun around December 1999 or January 2000. The Sandia Deputy Director for the Materials Engineering Sciences Center (under which LIGA has been developed) stated that once the two employees discussed their intent to work for Axsun, she wrote a letter to the company. The letter, dated January 21, 2000, stated:

> Intellectual Property encompassing Sandia's LIGA technology may include patents, copyrights and trade secrets (we call trade secrets 'CVI'). It is understood that [the two employees], who are currently Sandia employees, are being considered for employment by Axsun in connection with the foundry. [The two employees] have custody of a portion of Sandia's CVI and are legally bound not to disclose it without permission. Accordingly, Axsun will need a license from Sandia to use this CVI, as well as other related IP. Sandia is prepared to offer Axsun a nonexclusive license, in a field-of-use that bears a reasonable royalty.

According to the Sandia Deputy Director, Axsun knew that the two employees could not work on the LIGA technology without a license. She said that when the employees first started working for Sandia, they signed an Employee Proprietary Information and Innovation Agreement. This agreement stated that the employee

[13] One scientist is on Entrepreneurial Leave that expired in February 2002.

would not disclose proprietary or sensitive information (including manufacturing procedures and production techniques) which came into their possession in the course of their employment.

Sandia claimed that "The availability of CVI protection allowed Sandia to attract an industrial partner to an arrangement that serves both competitiveness and national security goals," and that Sandia "uses CVI protection solely to make information that cannot be patented more attractive to industry." However, it is clear that these were not the only reasons Sandia chose to use CVI protection. In the case of Axsun, the CVI protection was used as a means of avoiding any concern about possible violations of Sandia disclosure agreements, thus facilitating the transfer of two Sandia employees to Axsun.

Sandia Did Not Have a Process For Addressing Conflict of Interest Under a Trade Secret License

The DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (d), "Conflict of Interest – Technology Transfer," states that "The Contractor shall develop implementing procedures that seek to avoid employee and organizational conflicts of interests, or the appearance of conflicts of interests, in the conduct of its technology transfer activities." The implementing procedures provided by Sandia with respect to this requirement address their contractually recognized CRADA activities. Sandia's implementing procedures require the identification of those individuals having potential conflicts of interest, and the development of certain determinations of the potential for a conflict of interest and plans for mitigation which must be forwarded to DOE for review. Sandia's implementing procedures do not specifically address trade secret licenses, since trade secrets are not a recognized technology transfer activity.

In the case of the Axsun license, the two Sandia employees were negotiating with Axsun concerning prospective employment prior to the license, and each received $13,680 as their share of the $400,000 royalty Axsun paid for the CVI. These two employees were considered to be core producers of the CVI and provided prototypes to Axsun to show the merits of LIGA. However, Sandia did not submit for DOE review any determination for the potential of a conflict of interest or any plan for mitigation. Sandia did not have a process for addressing the potential of a conflict of interest under a trade secret.

RECOMMENDATIONS We recommend that DOE General Counsel:

1. Survey all Department facilities that generate intellectual property and determine if any facilities other than Sandia are issuing licenses for "know-how," "CVI," or "trade secrets," and take appropriate action if other violations of DOE policy are found.

2. Issue formal guidance to all Department facilities that generate intellectual property on the implementation of 10 C.F.R. § 1004.3.

3. Review the concept of licensing technical information with commercial value to determine if there are licensing mechanisms that do not compromise DOE's statutory mandate, and that would protect the interests of the Department, the contractor, and the licensee.

We recommend that the Albuquerque Patent Counsel:

4. Review all Sandia licenses that contain trade secret information, and determine if these licenses can be modified to comply with the management and operating contract, DOE Policy, and the DOE statutory mandate, or if it would be in the best interest of the public to revoke these licenses and explore other methods of intellectual property protection.

We recommend that the DOE Contracting Officer:

5. Review the collection and retention of the royalty fees received by Sandia under trade secret licenses, and determine if Sandia should be allowed to retain these fees, or if these fees represented miscellaneous receipts that should have been deposited into the General Fund of the Treasury.

6. Determine if Sandia's actions resulted in an inappropriate augmentation of its funds in violation of the Department of Energy Acquisition Regulations.

7. Take appropriate action to recover the royalty fees if Sandia's collection and retention of $617,422 in royalty fees constituted miscellaneous receipts and/or resulted in an inappropriate augmentation of funds.

8. Review the costs incurred by Sandia in developing the trade secret licenses, and determine if these costs are allowable or if Sandia must reimburse these costs to the Department.

9. Review the facts and circumstances surrounding the issuance of the Axsun license and determine if there was either a conflict of interest, or an appearance of a conflict of interest, in violation of DEAR 970.5204-40.

10. Review the actions of Sandia officials involved in the issuance of trade secret licenses, and take appropriate actions based upon this review.

MANAGEMENT COMMENTS

In response to a draft of this report, the Albuquerque Operations Office (Albuquerque) provided comments signed by the Acting Chief Counsel. The Albuquerque Operations Office concurred with recommendations 1 through 10. In Albuquerque's comments, the Acting Chief Counsel and the Patent Counsel provided a number of comments and suggested changes intended to clarify and reinforce certain aspects of the report findings. In response, the report was modified where appropriate.

In addition to these comments and suggested changes, the Acting Chief Counsel also provided a number of general comments on the conditions identified in the draft report. Because of the voluminous nature of these comments, we have not included them verbatim. However, the following provides a summary of the most significant comments.

The Acting Chief Counsel stated that the Sandia personnel involved in instigating the practice of licensing trade secrets have fully acknowledged that, under the contract, "first-produced data cannot be licensed as a trade secret." He stated that they were advised both verbally and in writing over the course of approximately 10 years that DOE policy and their customer's (DOE's) wishes prohibited creation, maintenance, or licensing of trade secrets, and that they made a conscious decision to violate that policy. He further stated that, from December 2000 to March 2001, and then again in the summer of 2001, the primary defense that Sandia provided for its actions was the allegation that AL's previous Patent Counsel had told Sandia's Chief Counsel – Intellectual Property, that Sandia could license CVI, know how, or trade secrets but to keep it secret from DOE. He also stated that this defense has proven untrue.

The Acting Chief Counsel stated that Sandia personnel have insisted they were fully supported by Sandia management in their efforts, and that DOE should not have to bear any costs of a prohibited licensing activity that was conducted in secrecy.

In addition, the Acting Chief Counsel stated Sandia's claims of creating value for DOE Programs and industry are completely invalid. He also stated that, other than income to Sandia, "there is no value to DOE Program or industry that could not be obtained by the numerous forms of technology transfer authorized by DOE." Further, he stated that Axsun has been particularly disadvantaged by the license it paid heavily for, in that it could have had free use of all the data covered by the license. He pointed out that if, for example, a Funds-in agreement had been negotiated, it could have had some form of ownership or control of intellectual property derived from work performed under a Funds-in agreement. Sandia has never been able to explain the advantage of this license to Axsun, according to the Acting Chief Counsel.

The Acting Chief Counsel noted that, with respect to technology transfer (of which licensing is a part), DOE's facilities and laboratories are prohibited from competing with the private sector. He stated that the trade secret area of intellectual property management is primarily about putting the holder of the trade secret in the strongest possible competitive position. The Acting Chief Counsel stated that Sandia has violated the prohibition against competition.

The Acting Chief Counsel stated it is never a bad idea to review existing policies and procedures for change and improvement; and that reviewing the concept of licensing technical information to find licensing mechanisms that do not compromise DOE policy and its statutory mandates would be desirable. However, he stated that the creation, maintenance and licensing of trade secrets will never be appropriate for a federally-funded technology transfer program. He also stated that Sandia, however, continues to push the concept of trade secrets because "it allows the Lab the maximum amount of control with the least amount of accountability, by virtue of the secrecy factor."

The Acting Chief Counsel stated the Sandia Director, California Legal and Patent Center, relies on only one paragraph--Technology Transfer Mission, subparagraph (a)(2)--in Sandia's contract and ignores the obligations in all other clauses and paragraphs of this clause, to justify the trade secret licensing program. The Acting Chief Counsel stated that "the licensing of

trade secrets also requires the non-performance of the obligations of the Patent Rights, Technical Data, and Technology Transfer - Mission Clauses of Sandia's Contract." The Acting Chief Counsel also stated that, "in every instance where a Sandia trade secret has been created, Sandia has deliberately failed to perform vital obligations of its contract."

The Acting Chief Counsel stated that, for informational purposes, two copyright packages that were licensed to Axsun were ultimately submitted and approved, but not until considerably after the Axsun license was in place. He stated, because of that, Sandia had no right to commercially license the software that had not been previously approved. He also stated the LIGA Scanner Control Software and the Plating Tank Control Software were originally explained as being general descriptions of a number of software packages, such that individual software programs in the packages should be submitted for approval. The Acting Chief Counsel stated that has never happened.

The Acting Chief Counsel also stated that if the terms and conditions of the Axsun license are to be met, it is questionable whether the obligations accompanying the software approval will be met (e.g., submission to the Energy Software and Technology Center), in which case approval should be withdrawn. The Acting Chief Counsel noted that the failure to submit can hardly be inadvertent, since the Axsun license is dated June 2000 and his office repeatedly requested submission of the software from the Director – California Legal and Patent Center after the December 2000 notice that the Axsun license existed. He stated these software packages were submitted to his office for approval in October 2001, and that "the time disparity suggests that what was licensed to Axsun was not necessarily what was ultimately submitted for approval; if so, that situation has not been corrected."

The Acting Chief Counsel stated that "since DOE owns everything developed at Sandia at origination, the waivers that allow Sandia to pursue technology transfer, as well as the delegation of authority in many related areas, are based on a history of cooperation between Sandia and DOE, particularly in areas where the contract is not explicit." He stated that, in those areas, Sandia has previously looked to DOE for instruction and interpretation of its contractual obligations. He stated there has previously been no need for an amendment to a contract in order to provide the customer's instructions to the contractor with an expectation that those instructions would be complied with. He also stated this is a dramatic departure from the spirit of cooperation.

The Acting Chief Counsel stated Sandia continues to expect DOE not to insist on Sandia's performing the contract to the letter. He also stated that, seemingly, Sandia has developed an internal policy where it expects to avoid contract requirements or to insist on reading the contract narrowly, depending on what is most advantageous to Sandia. He also stated that "Sandia is currently still justifying its trade secret licensing practice with the assertion that no statute mandates dissemination," and that "Sandia has refused to address the actual dissemination paragraphs in the various statutes that are applicable."

In addition, the Acting Chief Counsel stated that one Sandia defense for ignoring its contractual requirements has been that the technology licensed to Axsun is too sensitive to be reported to DOE and/or to be patented. He stated this defense is also invalid, and that, "in fact, if the technology is sensitive, even if not classified or UCNI [Unclassified Controlled Nuclear Information], DOE AL Program's cognizant program official would not approve Sandia's election of title for such technology, thus preventing Sandia from commercializing such technology at all."

The Axsun license falsely represents to a private sector entity that Sandia owns or permissibly controls the licensed technology and information, according to the Acting Chief Counsel. He stated that Sandia does not own the information that it licensed in any of its CVI licenses, and that DOE has not given permission to Sandia to license the information or to "control" it in the sense Sandia is representing to the public; and that this is true of all CVI licenses. He also stated Sandia is misrepresenting the facts to induce private sector parties to pay for rights that Sandia cannot give.

Such inappropriate action on the part of a Government-owned national laboratory creates a liability for DOE, according to the Acting Chief Counsel. He stated that, since the CVI information is owned by the Government under the M&O contract provisions, Sandia simply does not have the right to license such Government-owned information. He also stated it is questionable whether Sandia could even be given such a right because licensing of Government-owned information is an "inherently Governmental function."

The Acting Chief Counsel stated that forcing a private sector party to obtain a license by misrepresenting the facts about that party's ability to use Sandia's information and technology without the license is unacceptable. He stated that since neither Sandia nor the

two employees who went to work for Axsun owned the information and technology licensed to Axsun, Axsun did not need a license to obtain the technology and could have obtained a legitimate arrangement from DOE that would have allowed Axsun access to the technology and information, even to have the two employees work on the technology. He also stated that, "under these circumstances, the royalty charged is hardly reasonable." He went on to state that "the Sandia Deputy Director who is apparently in a position to deal with the public, knew or should have known this;" and that, "certainly, Sandia-California Legal staff and Sandia – California Technology Transfer staff were aware that Axsun was not being provided accurate disclosure of the facts."

The Acting Chief Counsel stated that by choosing CVI protection, Sandia obtained secrecy, which, in this case, allowed Sandia more control, to the detriment of both DOE and Axsun. He stated that "Sandia also chose a non-exclusive license to avoid the requirement for DOE approval because of the involvement of the former employees; nonexclusivity in connection with a CVI or trade secret license makes no sense." According to the Acting Chief Counsel, "the reasons given by Sandia are invalid; Sandia appears to have been motivated by the desire to obtain the most money with the least amount of accountability."

In his response to the draft report, the DOE Deputy General Counsel, Technology Transfer and Procurement, concurred with the recommendations directed to his office, recommendations 1, 2 and 3. The Deputy General Counsel also provided a number of comments and suggested changes intended to clarify and reinforce certain aspects of the report findings. In response, the report was modified where appropriate.

In addition to comments and suggested changes, the Deputy General Counsel provided some general comments on the conditions identified in the draft report. As we did with the Albuquerque Operation Office comments, we have not included the Deputy General Counsel's comments verbatim because of the voluminous nature of these comments. However, the following provides a summary of the most significant comments.

The Deputy General Counsel stated that a non-exclusive license, such as issued by Sandia, does not help anyone commercialize the subject information, since by issuing a nonexclusive license, Sandia was still free to issue additional licenses to competitors of Axsun. The Deputy General Counsel did not agree that Sandia's

licensing scheme created a benefit for DOE programs of value to industry. She said that DOE programs would have obtained the same benefit and Axsun would have obtained the equivalent value had Sandia provided the technical data to Axsun without restriction and royalty fee.

The Deputy General Counsel stated that DOE's mandate to disseminate information does not categorically require that all technical data first-produced must be released to the public in an unrestricted manner. In some circumstances, the Department has recognized that dissemination can be satisfied by making the benefits of the use of first-produced data available to the public. According to the Deputy General Counsel, Sandia arrogated to itself, without consultation with DOE, the determination of how dissemination is satisfied.

In regards to conflict of interest, the Deputy General Counsel stated it is important to note that the management and operating contract governs the private use by the management and operating contractor and employees of technical data first-produced in performance of the management and operating contract. The Deputy General Counsel stated that Sandia did not have to resort to a license to govern a former employee's use of the data. She stated that once the patent, security and reporting requirements of the management and operating contract have been met, both the contractor and the ex-employee are free to make private use of such data. The Deputy General Counsel stated that if Sandia's reasoning is taken to its conclusion, then every national lab scientist could not take and use in later employment, information he or she had learned through working at the lab, which would greatly hinder the academic freedom central to the purpose of the national laboratory system. She stated that while the ex-employees obtaining permission to use such data would be prudent to assure that the management and operating contract and employment obligations were complied with, such permission does not justify a licensing transaction between Sandia and Axsun.

INSPECTOR COMMENTS

The comments received from the Acting Chief Counsel and the Deputy General Counsel, Technology Transfer and Procurement, and the actions planned, are responsive to the report's findings and recommendations.

Appendix I

SCOPE AND METHODOLOGY

We reviewed allegations surrounding the issuance of trade secret licenses by Sandia National Laboratories. In reviewing these allegations, we evaluated:

- Sandia's justification for issuing trade secret licenses.
- Sandia's process for issuing trade secret licenses.
- Sandia's receipt of royalties for trade secret licenses.
- The applicable DOE statutory guidance on the dissemination of the results of research and development activities, as well as DOE policy on trade secret licenses.
- The relevant provisions of the Freedom of Information Act and DOE implementing regulations.
- Relevant management and operating contract provisions.

As part of our review, we interviewed Sandia National Laboratories officials involved in the issuance of the trade secret licenses and the receipt of royalties. We also interviewed Department of Energy officials at the Albuquerque Operations Office and Department Headquarters. In addition, we reviewed documentation relating to the issuance of trade secret licenses, including: 1) Sandia's management and operating contract, including relevant provisions of the Federal Acquisition Regulations and the Department of Energy Acquisition Regulations; 2) the Freedom of Information Act; 3) Technology Transfer legislative history; 4) DOE Accounting Handbook; 5) United States Code establishing the National Nuclear Security Administration; 6) DOE and Sandia correspondence, both electronic mail and official memorandums; 7) Internal DOE correspondence; 8) Internal Sandia correspondence; 9) Sandia's trade secret license to Axsun Technologies; 10) Sandia's receipt register, license administration schedule, and receipt of royalties; 11) Sandia's review and approval form for the release of information; 12) Sandia National Laboratories CVI Listing; 13) DOE-Albuquerque's computer information page on technology partnerships; 14) Sandia's computer information page on technology transfer partnerships; 15) Sandia's computer information page on Microsystems Science, Technology, and Components; 16) Office and Management Budget's Circular number A-130 on Management of Federal Information Resources; and, 17) Axsun Technologies computer information page.

This inspection was conducted between March and November 2001, in accordance with the "Quality Standards for Inspections" issued by the President's Council on Integrity and Efficiency.

Appendix II

Relevant Criteria

DEAR 970.5204-40, "TECHNOLOGY TRANSFER MISSION," Subsection (n), "Technology Transfer Through Cooperative Research and Development Agreements," PART (3)(I), Withholding of Data:

> Data that is first-produced as a result of research and development activities conducted under a CRADA and that would be a trade secret or commercial or financial data that would be privileged or confidential, if such data had been obtained from a non-Federal third party, may be protected from disclosure under the Freedom of Information Act as provided in the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a (c) (7)), for a period as agreed in the CRADA of up to five (5) years from the time the data is first-produced. The DOE shall cooperate with the Contractor in protecting such data.

The Energy Reorganization Act of 1974:

> …the Administrator shall disseminate scientific, technical, and practical information acquired pursuant to this title through information programs and other appropriate means, and shall encourage the dissemination of scientific, technical, and practical information relating to energy so as to enlarge the fund of such information and to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding.

Freedom of Information Act, 10 C.F.R. § 1004.3 (e) Contractor Records. (1):

> 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).

Freedom of Information Act, 10 C.F.R. § 1004.3 (e)(2):

> Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in § 1004.3(e)(4) or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are not in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

Freedom of Information Act, 10 C.F.R. § 1004.3 (e)(3):

> The policies stated in this paragraph:
>
> (i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's right under contract to obtain

any contractor records and to determine their disposition, including public dissemination; and

(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

Freedom of Information Act, 10 C.F.R. § 1004.4 (e)(4):

For purposes of § 1004.3 (e)(2), 'technical data and information having commercial value' means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data.

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