

United States Department of Energy
Office of Hearings and Appeals

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| In the Matter of Ralph Stanton |) | |
| In the Matter of Brian Simmons |) | |
| |) | Case Nos.: FIA-13-0047 |
| Filing Date: July 8, 2013 |) | FIA-13-0048 |
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Issued: July 17, 2013

Decision and Order

On July 8, 2013, Brian Simmons and Ralph Stanton (“Appellants”) filed an Appeal from determinations issued to them by the Idaho Operations Office (“IOO”) of the United States Department of Energy (“DOE”) (FOIA Request Numbers OM-PA-027/HQ-2013-00997-F & OM-PA-13-026/HQ-2013-01031-F). In its determinations, IOO responded to the Appellants’ request for information filed under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. IOO determined that the Appellants sought a videotape that was not in its possession as it was the property of its contractor, Battelle Energy Alliance, LLC (“BEA”). This Appeal, if granted, would require IOO to release the requested videotape.

I. BACKGROUND

On May 7, 2013, the Appellants, who are employed by BEA,¹ submitted FOIA requests to the DOE seeking records regarding the release of plutonium at the Zero Power Physics Reactor (“ZPPR”) that occurred on November 8, 2011. *See* FOIA Appeal. As a result of the plutonium release, the Appellants contend that they were exposed to levels of radiation that exceeded safety levels. Among other records, the Appellants sought a copy of a videotape of the November 8, 2011, incident at the ZPPR, which recorded the sequence of events leading up to the release of the contaminants. The release of that videotape is at issue in the instant Appeal.

On June 12, 2013, IOO issued determination letters to the Appellants, stating that it was not releasing the videotape because it was not an agency record.² The Appellants appeal IOO’s decision to withhold the videotape, contending that the videotape is an agency record. They explained that on January 4, 2012, DOE’s Office of Nuclear Energy issued an “Accident Investigation Report” (“Report”) of the November 8, 2011, incident, and that the Report “paid

¹ BEA contracted with DOE to conduct the day-to-day operations at the Zero Power Physics Reactor.

² IOO also asserts that even if the videotape was an agency record, it would be withheld in its entirety pursuant to FOIA Exemptions (b)(3), (b)(6) and (b)(7)(a) and (f). However, as the primary issue before us is whether the videotape is an agency record, we will not consider the arguments pertaining to those FOIA Exemptions.

special attention to the importance of the video that captured the manner in which the radioactive contaminants were released and Battelle's emergency response." Appeal at 1-2.

II. ANALYSIS

The FOIA applies to agency records. *See* 5 U.S.C. § 552(f)(2)(A) ("record" and any other term used in this section in reference to information includes – (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format"). The FOIA does not specifically set forth the attributes that a record must have in order to qualify as an agency record that is subject to FOIA requirements. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *Id.* The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

- (1) The intent of the document's creator to retain or relinquish control over the document;
- (2) The ability of the agency to use and dispose of the record as it sees fit;
- (3) The extent to which agency personnel have read or relied upon the record; and
- (4) The degree to which the record was integrated into the agency's record system or files.

See, e.g., Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (2010).

In applying the first factor of the four-factor test, IOO stated that while the videotape was used to assist in the investigation of the November 8, 2011, incident, the videotape was created by BEA and BEA intends to maintain control over the videotape. *See* Email from Clayton Ogilvie, FOIA Officer, IOO, to Shiwali Patel, Attorney-Examiner, OHA (July 10, 2013). Indeed BEA is currently in possession of the videotape, of which DOE does not have a copy. *Id.* Accordingly, DOE cannot use and dispose of the record as it sees fit and the videotape has not been integrated into DOE's record systems or files. While DOE relied on the videotape in conducting its investigation of the plutonium release incident, in consideration of the other factors outlined above, we conclude that the videotape is not an agency record.

However, a finding that certain documents are not "agency records" does not end our inquiry. DOE's FOIA regulations state:

When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2).

10 C.F.R. § 1004.3(e).

In its response to our inquiries, IOO cited to its contract with BEA, specifically, clauses I.15(b)(1) and (b)(4) of Department of Energy Acquisition Regulation (“DEAR”) 970.5204-3,³ to support its argument that the videotape is contractor-owned. *See* Email from Clayton Ogilvie, FOIA Officer, IOO, to Shiwali Patel, Attorney-Examiner, OHA (July 10, 2013). Clause (b)(1) identifies contractor-owned records as including employment-related records, such as records generated during “employee-related investigations conducted under an expectation of confidentiality.” Clause (b)(4) identifies “litigation files, and documents covered by the attorney-client and attorney work product privileges” as contractor-owned. IOO explained that the videotape would have been overwritten as a normal course of business, but that BEA preserved the videotape, which is “now included in an investigation of the employee actions that contributed to the event.” *Id.* BEA expects that the investigation will remain confidential. *Id.* Moreover, “BEA preserved the video in anticipation of litigation with the employees involved in the incident and the video is now part of BEA’s litigation file.” *Id.* Indeed, the Appellants commenced an action against BEA by filing a complaint with the United States Department of Labor. *Id.* Thus, based on the above, we conclude that the DEAR contract clearly provides that the videotape is a contractor-owned record. *See In the Matter of Snake River Alliance*, OHA Case No. TFA-0468 (2011)⁴; *In the Matter of Donald A. Verrill*, OHA Case No. TFA-0364 (2010). Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Action Appeals filed by the Appellants on July 8, 2013, OHA Case Numbers FIA-13-0047 and FIA-13-0048, are hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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 your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration

³ “Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.”

⁴ Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

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