

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

In the Matter of:	Dinsmore & Shohl, L.L.P.	)	
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Filing Date:	September 26, 2013	)	Case No.: FIA-13-0062
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Issued: November 20, 2013

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**Decision and Order**

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On September 26, 2013, Dinsmore & Shohl, L.L.P. (“D&S” or “Appellant”) appealed a determination that it received from the Department of Energy (DOE) National Nuclear Security Administration (NNSA), in response to an August 13, 2012, request for documents that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to the FOIA request, NNSA identified numerous responsive documents, releasing all but two of them in their entirety. With respect to the two remaining documents, NNSA withheld both in their entirety, determining that one document was exempt from disclosure pursuant to FOIA Exemption 4, and the other was exempt under Exemption 5. In its Appeal, D&S challenges the adequacy of NNSA’s search for responsive records, as well as the applicability of the cited FOIA exemptions to the two withheld documents.

**I. Background**

On August 13, 2012, D&S submitted an extensive FOIA request to NNSA for records pertaining to the Waste Solidification Building Project (“WSB Project” or “the Project”) at the agency’s Savannah River Nuclear Site in Aiken, South Carolina. In its request, the Appellant sought the following seven categories of records pertaining to the WSB Project:

- (1) The contract regarding the WSB Project between NNSA and Savannah River Nuclear Solutions, L.L.C. (“SRNS”), the management and operations (M&O) contractor at the Savannah River Nuclear Site, including “all change orders or similar documents that have been executed by both parties” and “all requests for payment” that SRNS has submitted to NNSA pursuant to any contract between the parties with respect to the Project;

- (2) All payment and/or performance bonds obtained or provided by SRNS or Baker Construction Company, a subcontractor to SRNS, with respect to the Project;
- (3) All construction schedules submitted to NNSA by, or on behalf of, SRNS regarding the WSB Project, including all critical path schedules;
- (4) All correspondence sent by any employee, agent or other representative of NNSA to SRNS referencing, relating to, or commenting upon “the time of completion of the Project, the schedule for the completion of the Project, the quality of the performance of the work required to be performed by SRNS, any delays in the design process associated with the Project, any delays in the construction process with respect to the Project or the management practices of SRNS as [they relate] to the Project;”
- (5) All correspondence between NNSA and SRNS referring to or referencing “SRNS Under Fire From NNSA for Management of Waste Solidification Building,” an article which appeared in the June 22, 2012, edition of the Nuclear Weapons and Materials Monitor, and all notes memoranda, emails, and any other documents prepared by, or on behalf of, NNSA “that formed the basis of the positions taken in the June 12, 2012, correspondence from NNSA to SRNS” referenced in the article;
- (6) Any change notice or change order log or similar document detailing any SRNS request for a change order or change notification on the Project, including the date the request was made, the basis for the request, and the claimed costs or Project delay associated with the request; and
- (7) All claims by SRNS to NNSA for additional payment or equitable adjustment regarding the Project.

*See* Letter from Elizabeth L. Osheim, Deputy General Counsel, NNSA, to Mark C. Bissinger, Dinsmore & Shohl, L.L.P. (August 30, 2013) (Determination Letter) at 1-2. In its August 2013 determination, NNSA identified numerous responsive documents, all but two of which it released to the Appellant in their entirety. In addition, the Determination Letter described the results of NNSA’s search with respect to each of the seven categories of requested documents as follows:

- Regarding category (1), NNSA provided a copy of the conformed contract between the agency and SRNS, and noted that because SRNS is completing its work on the WSB Project as part of an M&O contract, no change orders or other documents requested in this category exist;
- NNSA identified as responsive to category (2) the performance bond and accompanying rider for Baker Construction Company, and released the documents to the Appellant in their entirety. However, NNSA noted that no

similar documents exist specific to SRNS. NNSA explained, “because SRNS is [a limited liability corporation], each of the parent companies have provided corporate guarantees of performance of the M&O contract as a whole, but there is nothing specific to the WSB Project;”

- NNSA identified the documents responsive to categories (3) and (4) and released them to the Appellant in their entirety;
- Regarding category (5), NNSA identified one responsive document, a letter titled “SRNS Response to WSB Letter.” The agency released the letter in its entirety, but withheld the attachment to the letter in its entirety pursuant to FOIA Exemption 4. In applying Exemption 4, NNSA concluded that, given the specific, proprietary, and confidential nature of the withheld information, its release would likely cause substantial harm to the competitive and financial position of the company “by giving competitors a means to gain a competitive advantage in the areas in which the company competes for work;”
- NNSA determined that there were no documents responsive to category (6) because “the contract is a cost reimbursement M&O contract and not a fixed-price construction contract;”
- Finally, regarding category (7), NNSA identified one responsive document, a Baseline Change Proposal (BCP) for the WSB Project, which NNSA was in the process of evaluating at the time of the FOIA request. Because the BCP was a proposal containing pre-decisional and deliberative information, NNSA withheld the document in its entirety pursuant to FOIA Exemption 5.

Determination Letter at 2-3.

Upon its receipt of NNSA’s determination, and the accompanying released documents, D&S filed the instant Appeal. *See* Letter from Mark C. Bissinger, D&S, to OHA (received September 26, 2013) (Appeal). The Appellant does not challenge NNSA’s responses regarding the documents requested in categories (2) and (6) of its FOIA request. *Id.* at 3. Therefore, we will not consider those two categories of the FOIA request in this Decision. With respect to the remaining categories of requested documents, the Appellant challenges the adequacy of NNSA’s search for responsive records, asserting that the agency’s response was insufficient because, given the large scope of the WSB Project, more responsive documents, such as additional correspondence, must exist. *Id.* at 3-5. In addition, D&S maintains that NNSA’s search was inadequate because the response did not produce several types of documents contained in the FOIA request. For example, regarding category (1), the Appellant contends that NNSA “merely produced a copy of the contract, and then explained that no change orders exist. However, the request also seeks a copy of documents ‘similar to’ change orders, as well as ‘all requests for payment that have been submitted by SRNS to NNSA’ for the Project. None of these latter items were produced or, in some cases, properly addressed in the response.” *Id.* at 4. Similarly, regarding categories (5) and (7), D&S notes that NNSA produced one document in each category, and argues that the agency failed to address several other items in the request. *Id.*

Finally, D&S maintained that NNSA's withholding of two documents in their entirety pursuant to FOIA Exemptions 4 and 5, respectively, was improper. *Id.* at 5-7.

## II. Analysis

### A. Adequacy of the Search

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., Project on Government Oversight*, Case No. TFA-0489 (2011).\*

In order to review the instant Appeal, we contacted NNSA to ascertain the scope of its search for responsive documents. NNSA informed us that copies of the FOIA request were provided to the WSB Project Federal Project Director and Deputy Federal Project Director, both of whom queried their staff for responsive documents. In addition, the Contracting Officer performed a search of her records. *See* Email from Timothy P. Fischer, Site Counsel and Assistant Manager, Contract Administration and Business Management, Savannah River Field Office, NNSA, to Diane DeMoura, Attorney-Advisor, OHA (November 1, 2013). The searches included "all electronic files, including computer records and email and the primavera scheduling database," as well as "paper records in the individuals' offices." *Id.* The search terms included "Waste Solidification Building," "WSB," "Baker Concrete Construction Inc.," "BCCI," "Baker," and "schedule." *Id.*

Based on this information, we find that NNSA performed an exhaustive search reasonably calculated to reveal records responsive to the Appellant's FOIA request, despite the fact that the search did not yield the volume of information that the Appellant may have expected. Therefore, the search was adequate.

However, in response to our inquiry concerning the Appellant's specific arguments as to the sufficiency of NNSA's response, the agency provided additional information regarding the results of its search. With respect to categories (1) and (7) – which included requests for the contract between NNSA and SRNS, any change orders or similar documents, and any requests from SRNS to NNSA for payments, additional payments or equitable adjustments – NNSA confirmed that it provided a copy of the conformed M&O contract between NNSA and SRNS. *Id.* According to NNSA, the WSB Project is "a capital line item project being performed within the larger scope of the SRNS [M&O] contract." *Id.* For funding purposes, the Project has "an overall approved baseline" and receives funding each fiscal year. Therefore, there are no change

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orders similar to those typical in a fixed-price contract. Instead, “when the Project experiences overruns or changes that will exceed the approved cost and schedule baseline SRNS must submit a BCP.” *Id.* The BCP at issue in this case was “the first to increase cost and schedule.” *Id.* Regarding the Appellant’s assertion that more correspondence must exist, NNSA confirmed that it provided all available “written communications with SRNS regarding [the] WSB.” *Id.* Finally, regarding the Appellant’s argument that more documents responsive to category (5) of the FOIA request must exist, the agency also stated that “there was no correspondence leading up to the June 12, 2012, letter from the Contracting Officer to SRNS.” *Id.*

## **B. Exemptions 4 and 5**

As noted above, in its Appeal, D&S challenges the NNSA’s withholdings of two documents in their entirety – the attachment to the SRNS letter and the BCP – pursuant to FOIA Exemptions 4 and 5, respectively. However, during the pendency of this Appeal, NNSA released the two documents at issue to the Appellant. *See* Letter from Elizabeth L. Osheim, Deputy General Counsel, NNSA, to Mark C. Bissinger, D&S (November 5, 2013). Therefore, the issue of the applicability of Exemptions 4 and 5 to the documents is now moot.

## **III. Conclusion**

As discussed above, we have concluded that NNSA’s search for records responsive to the Appellant’s FOIA request was adequate. Therefore, we will deny the portion of the Appeal pertaining to the adequacy of the search. In addition, because the applicability of Exemptions 4 and 5 is now a moot issue following NNSA’s release of the two previously-withheld documents, we will dismiss that portion of the Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 26, 2013, by Dinsmore & Shohl, L.L.P, OHA Case No. FIA-13-0062, is hereby dismissed in part and denied in part as set forth above.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Date: November 20, 2013