

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

In the Matter of: DLA Piper LLP)
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Filing Date: November 9, 2021) Case No.: FIA-22-0001
)
_____)

Issued: December 13, 2021

Decision and Order

On August 9, 2021, **Error! Reference source not found.** appealed a Determination Letter issued to Appellant from the Department of Energy’s (DOE) Oak Ridge Office (ORO) regarding Request No. ORO-2022-00021-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 denied the request, stating that any relevant records would be owned by Battelle Memorial Institute, the management and operations (M&O) contractor for DOE’s Pacific Northwest National Laboratory, and therefore would not be agency records subject to the FOIA. In his appeal, Appellant challenges the characterization of the requested records as contractor-owned. In this Decision, we grant the appeal.

I. BACKGROUND

Appellant submitted a FOIA request to DOE seeking:

all correspondence and related materials of any kind concerning any evaluation of License Agreement 525909 as between Battelle Memorial Institute and Unienergy Technologies, LLC and Unienergy Corporation, from January 1, 2020 to the present, including, without limitation, (i) any materials concerning defaults under the License Agreement and the evaluation and/or granting of waivers of defaults, (ii) any materials concerning an evaluation of a plan for U.S.-based manufacturing, and (iii) any materials of any kind concerning Vanadis Power or any of its owners, employees or agents.

Determination Letter at 1. ORO issued a determination letter to Appellant denying the request in its entirety because ORO had determined that any relevant records would not be agency records subject to disclosure under the FOIA. ORO cited to the “Ownership of Records” clause at

I-118(b)(5)(i)¹ of the prime M&O contract between Battelle and DOE (Prime Contract), which states that “executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence” are contractor-owned records. *Id.* ORO further explained that any such existing records would not be within DOE’s possession or control. *Id.* Appellant timely appealed the determination letter, arguing that all DOE contracts contain the statement that “all records acquired or generated by the contractor in its performance of this contract, . . . **shall be the property of the Government**”² FOIA Appeal Supporting Brief at 3 (emphasis in original). In support of its determination letter, ORO certified it had performed a detailed search and that no responsive records were within the possession or control of DOE’s Pacific Northwest Site Office. Agency Information Request 2 at 1.

II. ANALYSIS

It is well-established that contractor-owned records may be agency records subject to the FOIA. *Burka v. United States HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996); *In the Matter of Savannah River Site Watch*, OHA Case No. FIA-18-0039 at 4–5 (2018); *In the Matter of Ron Walli*, OHA Case No. FIA-19-0013 at 5–7 (2019). 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*, 87 F.3d at 515. 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 has outlined factors to assist in determining whether the agency had control over the requested records

¹ ORO mistakenly cited the clause as I-119(b)(5)(i) in the determination letter.

² We note that the language cited by Appellant omits key provisions of the clause. The full text of the cited sentence states:

Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, including records series described within the contract as Privacy Act systems of records, shall be the property of the Government and shall be maintained in accordance with 36 Code of Federal Regulations (CFR), Chapter XII, -- Subchapter B, “Records Management.”

Prime Contract at I-118(a). The crucial modifier omitted by Appellant is “[e]xcept as provided in paragraph (b),” which is the paragraph cited by ORO to support its assertion that the requested records would be contractor-owned. When read as a full sentence, the language Appellant cites is consistent with the reasoning ORO presented to justify its denial of the FOIA request.

at the time of the FOIA request, but they are not an “inflexible algorithm” and “any fact related to the document's creation, use, possession, or control may be relevant.” *Cause of Action Inst. v. OMB*, No. 20-5006, 2021 U.S. App. LEXIS 24901, at *8 (D.C. Cir. Aug. 20, 2021) (citing *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006)).

In order to determine whether documents at issue fall within the scope of Battelle’s work on DOE’s behalf and whether they are within DOE’s control, DOE must apply the tests outlined above. However, ORO based its determination solely on the Prime Contract, rather than an analysis of the relevant factual tests. Accordingly, we find that ORO’s reasons for denying the FOIA request were inadequate and, on remand, ORO should issue a new determination based on our decision.

III. CONCLUSION

For the foregoing reasons, it is hereby ordered that the Appeal filed on **Error! Reference source not found.**, by DLA Piper LLP, No. FIA-22-0001, is granted. The matter is remanded to ORO for further processing consistent with this decision.

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

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