

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

In the Matter of: DLA Piper, LLP)
)
Filing Date: February 4, 2022) Case No.: FIA-22-0006
)
_____)

Issued: February 28, 2022

Decision and Order

On February 4, 2022, DLA Piper, LLP (Appellant) appealed a Determination Letter issued to it 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. This appeal is the second to come before OHA regarding this FOIA request. In this Decision, we deny this 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 1 at 1. ORO issued its original 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

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

“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. OHA remanded the matter to ORO for further processing, finding that ORO had failed to apply the relevant factual tests when determining that the requested records were not agency records as defined by the FOIA. *DLA Piper*, OHA Case No. FIA-22-0001 (Dec. 13, 2021).

ORO issued Appellant a second determination letter on January 19, 2022, which again cited to the “Ownership of Records” clause in the Prime Contract and stated that DOE had not created and was not in possession of the requested records. Determination Letter 2 at 2. The letter also cited to *H&J Tool and Die Co.*, OHA Case No. VFA-0548 (2000), which found that certain records and correspondence related to a bid process were not subject to the FOIA because the M&O Contractor for Brookhaven National Laboratory was not a federal agency, the prime contract assigned ownership of those records to the contractor, and the records were not in DOE’s control at the time of the FOIA request. *Id.* ORO also stated that a search of DOE records at PNNL had been performed and no responsive records were found. *Id.* at 3.

Appellant timely filed an appeal of the second determination letter, arguing that ORO had failed to properly search for responsive records. Appeal 2 at 2. As evidence, he cited to two emails sent to him by employees with pnnl.gov email addresses which contained content that he asserts would likely have been found by an adequate search. *Id.* Appellant also argued that ORO’s statement that it did not control the requested records was conclusory and did not include the analysis required by the remand decision. *Id.*

In its response, ORO argued that PNNL is a set of buildings and assets that is managed and operated by Battelle and that the records requested were created by Battelle and remained in Battelle’s possession. ORO Brief at 1–3. ORO also stated that the two employees Appellant referred to were contractor employees, not DOE employees. *Id.* 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*

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.

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 at the time of the FOIA request: (1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record system or files. *Burka*, 87 F.3d at 515. However, these factors 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)).

The requested records here are divided into two categories for purposes of this decision: email records and non-email records. Non-email records do not appear to be obtained by DOE or under DOE’s control. As ORO Battelle’s employees use a DOE email system, the servers on which the emails are created and stored are DOE servers. Email records can be considered as being obtained by DOE when they are stored on DOE servers.

In determining control, we turn first to the *Burka* factors. The first factor, the intent of the document’s creator to retain or relinquish control over the record, weighs in ORO’s favor. Battelle has made it clear that they intend to retain control over the records. The second factor, DOE’s ability to use and dispose of the records, weighs in favor of Appellant. The records are stored on DOE servers and may be searched by DOE employees as needed. The third factor, the extent to which DOE personnel have read or relied on the documents, weighs in ORO’s favor. ORO asserts that DOE was not involved in the communications in question. The fourth factor, the degree to which the records are integrated into DOE’s record system, weighs in Appellant’s favor, as they are stored on DOE servers. Addressing the totality of the circumstances, the language of the prime contract weighs heavily in favor of ORO, expressing DOE’s intent that the records should not be agency records. On balance, we find that, in this instance, the requested records are not under DOE’s control for purposes of the FOIA. Because this second prong of the *Tax Analysts* test is not met, the requested records are not agency records for purposes of the FOIA. As such, we find that the search of federal records was adequate.

III. ORDER

It is hereby ordered that the Appeal filed on February 4, 2022, by DLA Piper, LLP, No. FIA-22-0006, is denied.

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

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect one's right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS, College Park, MD 20740
Web: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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