

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

In the Matter of: Los Alamos Study Group )  
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Filing Date: June 29, 2022 ) Case No.: FIA-22-0021  
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Issued: July 11, 2022

**Decision and Order**

On June 29, 2022, Los Alamos Study Group (Appellant) appealed a Determination Letter issued to it from the National Nuclear Security Administration’s (NNSA) Office of the General Counsel regarding Request No. FOIA-22-00083-KM. In that determination, NNSA responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. NNSA stated that it did not find any responsive documents and that the responsive documents located by the DOE contractor were not agency records subject to release under the FOIA. The Individual appealed the classification of the contractor’s responsive records as non-agency records. In this Decision, we grant the appeal.

**I. BACKGROUND**

On December 23, 2021, Appellant filed a FOIA request with DOE seeking:

The annual five-year site-wide staffing plans developed by Los Alamos National Laboratory for the years 2018, 2019, 2020, and 2021. These staffing plans are mentioned on pages 26-27 in the “Plan to Produce 30 Pits per Year at Los Alamos National Laboratory,” LA-CP-19-20624, dated September 2019, and published on our website here: <https://lasg.org/MPF2/documents/LASGFOIA-PlanToProduce30PPY-LANL-LA-CP-19-20624-Sep2019.pdf>.

Determination Letter at 1. The pages referenced in the document linked in the request state that Los Alamos National Laboratory (LANL) issues a five-year site-wide staffing plan annually and the 2018 plan developed for 2019–2023 was modified to include staffing plans related to the pit production mission. *Plan to Produce 30 Pits per Year at Los Alamos National Laboratory*, Los Alamos National Laboratory at 26–27, available at <https://lasg.org/MPF2/documents/LASGFOIA-PlanToProduce30PPY-LANL-LA-CP-19-20624-Sep2019.pdf>. Contractor employees are referred to as LANL staff throughout the document. *Id. passim*. DOE Headquarters transferred the request to NNSA for processing. Determination Letter at 1. NNSA determined that the Los Alamos Field Office (NA-LA) was most likely to possess the documents and forwarded the request there for a search. NA-LA conducted a search of its files

using the phrases “[a]nnual five-year-five-year site-wide staffing plans developed by LANL,” “[f]ive-year site-wide staffing plans developed in 2018 for 2019-2023,” “[m]entioned on pages 26-27, Plan to Produce 30 Pits per Year at Los Alamos National Laboratory,” “LA-CP-19-20624,” and “[d]ated September 2019.” *Id.* No responsive documents were found. NA-LA also directed LANL’s prime contractor, Triad National Security, LLC (Triad), to perform a search for the requested records. Triad’s search yielded results. Triad informed NA-LA that the responsive records were procurement-related records, and per the Prime Contract between DOE and Triad, such records were owned by Triad and not considered agency records. Triad did not provide the records to NNSA for review. NNSA Exhibits 1–3 at 1. NNSA did not indicate that its headquarters files were searched.

On March 31, 2022, NNSA issued a final Determination Letter to Appellant. Determination Letter at 1. The letter stated that no responsive records had been located at NA-LA. It further noted that Triad had located procurement-related records that were within LANL’s possession and control and that, pursuant to the LANL-Triad prime contract (Prime Contract), these records were not agency records subject to the FOIA. *Id.* NNSA cited to DEAR Clause 970.5204-3(b)(3), incorporated into the Prime Contract at section I-20, to support its assertion that “records relating to any procurement action are owned by the contractor.” *Id.* at 2; Prime Contract at I-20.<sup>1</sup>

Section I-20 of the Prime Contract states, in relevant part:

(a) *Government-owned records.* 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 CFR, Chapter XII, Subchapter B, “*Records Management.*” The contractor shall ensure records classified as Privacy Act system of records are maintained in accordance with FAR 52.224.2 “*Privacy Act.*”

(b) *Contractor-owned records.* The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. [The contracting officer shall identify which of the following categories of records will be included in the clause, excluding records operated and maintained in DOE Privacy Act system of records].

(1) Employment-related records (such as worker’s compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, excluding records operated and maintained by the Contractor in Privacy Act system of records. Employee-related systems of record may include, but are not limited to: Employee

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<sup>1</sup> The Prime Contract is available to the public at <https://www.energy.gov/nnsa/los-alamos-national-laboratory-contract>.

Relations Records (DOE-3), Personnel Records of Former Contractor Employees (DOE-5), Payroll and Leave Records (DOE-13), Report of Compensation (DOE-14), Personnel Medical Records (DOE-33), Employee Assistance Program (EAP) Records (DOE-34) and Personnel Radiation Exposure Records (DOE-35).

...

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232-3 are described as the property of the Government; ... .

Prime Contract at I-20 (page 102–03).

On June 29, 2022, Appellant timely filed the present appeal, arguing first that the records located by Triad are not procurement-related records. Appeal at 2. Appellant asserted that “procurement” means “the purchase of goods, services, or works from entities external to Triad,” and therefore “Triad’s strategies for hiring and retaining its own staff to perform DOE’s mission” did not constitute procurement. *Id.* Appellant further asserted that even if Triad sought to subcontract services to complement or replace its own staff, Appellant was not seeking records relating to such procurements, but rather just the staffing plans.

Next, Appellant cited to the Prime Contract at I-20(a), provided above, and DOE’s FOIA regulations at 10 C.F.R. § 1004.3(b)(1). *Id.* The cited DOE FOIA regulation states, in relevant part:

(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).

...

(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 rights 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.

10 C.F.R. 1003.4(b). Appellant stated that this regulation was “adopted, in part, in recognition that DOE’s heavy reliance on contractors to carry out basic governmental functions could—inadvertently or purposefully—conceal information regarding the contractors and DOE activities that would ordinarily be accessible through FOIA requests.” Appeal at 2. Appellant also argued that the staffing plans are agency records created and maintained solely for NNSA’s benefit. *Id.* at 3. In support, Appellant reasoned that the records were not Triad’s private property because the staffing plans would likely survive Triad’s contract as the majority of employees working at LANL

are hired by any new contractor when it takes over management and operations of the laboratory. *Id.* Appellant asserted a strong public interest in understanding the challenge and potential impacts of the requested staffing plans because of the size and cost of the pit production plan. *Id.* at 3.

Appellant further argued that “[i]t is not believable that NNSA and its staff would not maintain copies of these management plans in the regular course of conducting government business.” Appeal at 2–3. In support, Appellant cited Prime Contract III.2.1, which states:

No later than 30 calendar days after the effective date of the Contract the Contractor shall provide NNSA its plan for achieving the right workforce size and skills mix and an estimate of the number of employees at each site to whom it expects to make employment offers. This staffing plan shall highlight essential skills and personnel that must be retained, by position, to ensure continuity of essential mission, safety, security, and safeguards programs.

NNSA’s response to the Appeal included a memorandum from Triad to NA-LA , dated March 18, 2022, in which a Triad attorney explained the contractor’s reasoning for categorizing the responsive records as non-agency records. NNSA Exhibit 1. Triad asserted to NA-LA that the staffing plans were procurement action records falling under Prime Contract I-20(b)(3) as contractor-owned records. A Triad Human Resources subject matter expert had indicated that the staffing plans were intended to guide contractor hiring and constituted personnel records. *Id.* at 1. The expert also indicated that, to his knowledge, the staffing plans were not a Prime Contract deliverables and had not been shared with NNSA. *Id.* Triad also cited to an OHA decision, *H & J Tool & Die Co.*, OHA Case No. VFA-0548 (2000),<sup>2</sup> to assert that “[r]ecords that are maintained by the contractor as part of its subcontractor procurement system, [sic] are specifically contractor-owned records and not subject to the FOIA.” *Id.* at 2.

Triad also asserted to NA-LA that the staffing plans were employment-related records, designated as contractor-owned under Prime Contract I-20(b)(1). NNSA Exhibit 1 at 3. Triad described its staffing plans—which it noted were previously completed by the former LANL contractor, Los Alamos National Security, LLC—as internal documents created from and contributing to Triad’s employment records. *Id.* Triad further stated that the plans draw from and reproduce information pertaining to current employees and describe open positions in detail, such as the salary compensation received for the position. *Id.*

Ultimately, Triad’s memorandum informed NA-LA that it would return a “no records found” response because it had determined that the responsive records were not agency records subject to the FOIA.

Upon request, Triad provided OHA access for an in-camera review of a sample of the responsive records. Our review of the sample revealed that the staffing plans consist of charts listing necessary positions and describing them using various categorizations, displayed in columns, such as the type of position, type of employment, the office in which the position is housed, and whether and by whom the position is filled. Certain category columns were partially or fully redacted on each

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<sup>2</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at [www.energy.gov/oha](http://www.energy.gov/oha)

file viewed. No discernable salary information is included in the staffing plans that we reviewed. The documents include limited amounts of Personally Identifiable Information (PII) in a category column for the full names of employees hired, as well as information with potential privacy interests in a category column for the first names of the Human Resources employees who did the hiring. The staffing plans also include category columns indicating whether a position is currently open or projected to be open in the future. In the case of the latter, a categorical reason is provided.

## II. ANALYSIS

When an agency denies a FOIA request, it is the agency's burden to justify its decision, showing that: (1) the responsive records are not agency records; (2) responsive agency records were not withheld; or (3) responsive agency records were properly withheld. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 232 (D.D.C. 2010) (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980)). In its Determination Letter, NNSA asserted that responsive records in Triad's possession are not agency records and that no responsive records in NA-LA's possession existed (and thus none were withheld).

In the analysis below, I consider whether the responsive records in Triad's possession are government-owned under the Prime Contract and whether they are therefore agency records subject to release under DOE's FOIA regulations. I then turn to whether NNSA's search of records in possession of NA-LA and Triad was adequate.

### A. Applicability of Prime Contract I-20

Section I-20 of the Prime Contract describes which contractor-created records are government-owned and which are contractor-owned. It does not specifically define "employment-related" or "procurement action." Therefore, the contract must be interpreted using the plain meaning of the words and provisions must be interpreted so as to make them consistent.<sup>3</sup> *Arko Exec. Servs. v. United States*, 553 F.3d 1375, 1379 (Fed. Cir. 2009); *Abraham v. Rockwell Int'l Corp.*, 326 F.3d 1242, 1251 (Fed. Cir. 2003).

#### 1. Employment-Related Records

The records described in the Prime Contract as employment-related are records that pertain to specific positions or employees; records describing compensation determined and provided solely by the contractor; and records of sensitive events, such as labor, investigative, medical, or ethics actions. Prime Contract I-20(b)(1). All of the record types listed, non-exclusively, by the Prime Contract are records that arise from Human Resources programs that administer benefits, compensation, and employee safety and wellness to individuals or entities. The staffing plans at issue are general plans, not specific to a certain employee, arising from laboratory operations across the entire facility. The staffing plans could serve their function—informing the contractor of what required roles exist and whether they are filled—even if no individual employee or compensation information was included, indicating that the plans' main functions are more akin

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<sup>3</sup> In the absence of a more specific choice of law provision, federal contract common law governs the Prime Contract.

to that of a supply list than a roster. With that in mind, I find that the staffing plans are not employment-related records of the kind referenced in Prime Contract I-20(b)(1).

## 2. Procurement Action Records

Prime Contract I-1 states that the words in contract clauses have the same meaning as their definition in the Federal Acquisition Regulation (FAR) unless the word is defined in other specific ways. Prime Contract I-1 (page 56). Prime Contract I-20 does not include a specific definition “procurement action,” so the FAR’s definition of “procurement,” defined by reference to its definition for “acquisition,” applies. FAR 2.101. The FAR states that “acquisition” means:

[T]he acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

FAR 2.101. The FAR does not govern recruitment for internal staff. Therefore, its definition of procurement, incorporated into the Prime Contract by reference, does not include internal hiring practices.

In *H & J Tool & Die*, the FOIA requester sought records relating to bid solicitations, contract awards, and performance evaluations for lamination work at Brookhaven National Laboratory. VFA-0548 at 1. We held that the requested records were owned by Brookhaven Science Associates (BSA), the management and operations contractor for Brookhaven National Laboratory at that time, because they fell within the scope of language in BSA’s Prime Contract deeming it related to a procurement action. *Id.* at 3. That language quoted in the decision is identical to the corresponding language in Triad’s Prime Contract I-20(b)(3).

The records requested in *H & J Tool & Die* were related to contractor actions to contract for construction services. Unlike the records requested in *H & J Tool & Die*, Triad’s staffing plans pertain to internal hiring. Far from Triad’s assertion that the case designates all contractor records relating to personnel as contractor-owned, *H & J Tool & Die* presents a narrow ruling that records relating to the awarding and performance of contracts for external subcontractors to provide a specified service for a contractor are related to procurement actions.

For the foregoing reasons, I find that the staffing plans are not related to a “procurement action” under the Prime Contract’s definition of procurement and, therefore, are not contractor-owned records under Prime Contract I-20(b)(3).

Because NNSA has not presented an applicable exception to Prime Contract I-20(a), I find that NNSA has not met its burden to prove that the staffing plans are contractor-owned records not subject to the FOIA.

## **B. Applicability of 10 C.F.R. 1004.3(b)**

Appellant argues that DOE's FOIA regulations expand on the FOIA's disclosure mandates because the agency's use of contractors could prevent the kinds of disclosures the FOIA was intended to promote. DOE promulgated the rule now located at 10 C.F.R. § 1004.3(b) in 1994, codifying DOE's then-extant practice. 59 Fed. Reg. 63882. In responding to comments criticizing the rule, DOE adopted the rule, the language of which remains substantively unchanged, stating that "the contractor records policy adopted by DOE promotes openness in government and continues to provide the public access to DOE contractor records." *Id.* at 63883. The response also "makes clear that even were a requested record not owned under the contract by the government, DOE can exercise its contractual rights to acquire possession of the record if necessary to maximize public disclosure of records concerning health, safety, and the environment." *Id.*

The staffing plans are not contractor-owned records and therefore, pursuant to Prime Contract I-20(a), they are government-owned. DOE's regulations mandate that, except as described by 5 U.S.C. § 552(b),<sup>4</sup> government-owned records are subject to disclosure under the FOIA if they are possessed by DOE or the contractor. Accordingly, the staffing plans are subject to disclosure under the FOIA. Because DOE's own regulations instruct the agency to disclose such records, an analysis of possession and control is not necessary. All requested records have been located and are subject to the FOIA, so we need not reach a decision as to whether NNSA's search was adequate.

## **III. ORDER**

It is hereby ordered that the Appeal filed on June 29, 2022, by the Los Alamos Study Group, No. FIA-22-0021, is granted. The matter is remanded to NNSA for further processing consistent with this decision, including reviewing the staffing plans for segregable information that may be withheld under 5 U.S.C. § 552(b).

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

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<sup>4</sup> 5 U.S.C. § 552(b) contains allowable and mandatory exceptions to disclosure under the FOIA.

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](mailto:ogis@nara.gov)  
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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