United States Department of Energy
Office of Hearings and Appeals

In the Matter of Citizens United for Resources and the Environment	)	
Filing Date: May 4, 2023	)	Case No.: FIA-23-0016

Issued: July 25, 2023

Decision and Order

On May 4, 2023, Citizens United for Resources and the Environment (CURE or Appellant) appealed a determination letter dated February 2, 2023, issued by the Department of Energy's (DOE) Golden Field Office (GFO). The letter responded to Request No. GFO-2023-00167-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The determination letter noted that 803 pages of responsive documents were found and would be released with some redactions pursuant to Exemptions 4 and 6 of the FOIA. The Appellant challenges the redactions made pursuant to Exemption 4, the redactions made pursuant to Exemption 6, and the adequacy of the search, generally alleging that GFO did not provide relevant documents it was required to share. In this Decision, we grant the appeal in part and deny it in part.

I. Background

On November 9, 2022, Appellant submitted a FOIA request to GFO. FOIA Request from Citizens United for Resources and the Environment at 1 (Nov. 9, 2022). The request asked for the following information:

1. Final Contract between [National Renewable Energy Laboratory](NREL) and [Los Angeles Department of Water and Power (LADWP)] LADWP for Contract NREL/TP-6A20-79444-ES (the LADWP Contract).
2. All subcontracts let between NREL/Alliance[1] and any subcontractors performing work under the LADWP contract.
3. Any change orders that increased the cost of the original contract price of the LADWP Contract.
4. Any audit of the final costs relating to the LADWP Contract.
5. Any determination by any federal agency (including the Small Business Administration) that subcontractors under the LADWP contract could be sole sourced rather than competitively bid.
6. All communications (emails, texts and hard copies) between NREL and the Alliance concerning the proposed contract with City of Riverside Public Utilities (the RIVERSIDE Contract).

[1] Alliance is the contractor that operates NREL.

7. All communication (emails, texts and hard copies) between NREL (including but not limited to the Alliance and any employee or contractor of the Alliance) and any employee or elected official of RIVERSIDE concerning the RIVERSIDE Contract.
8. All communications (emails, texts and hard copies) with Kearns & West concerning the RIVERSIDE contract, an entity that is identified in the RIVERSIDE contract.
9. Any proposed subcontract between Kearns & West and NREL and/or the Alliance.
10. All communications with UC Riverside and NREL and/or the Alliance concerning the RIVERSIDE contract.
11. Any proposed subcontract between UC Riverside and NREL and/or the Alliance concerning the RIVERSIDE contract.

Id. at 2.

DOE acknowledged receipt of the original request on November 10, 2022. Acknowledgement Letter from GFO to CURE at 1 (Nov. 10, 2022).

The Appellant amended the request on December 1, 2022. Amended FOIA Request from CURE at 1 (Dec. 1, 2022). In the amendment they additionally asked for:

12. Any statute, guideline, policy or regulations limiting, prohibiting, restricting and/or clarifying whether and when the Alliance can or should compete with private companies offering similar services.
13. Any documents produced by any DOE employee including, but not limited to, Peter Luft concerning the Alliance and Draft Contract.
14. Any documents generated by anyone at the DOE concerning the LADWP Contract including, but not limited to, any audits, change orders, and invoices.
15. Any documents, policies, guidelines, regulations, and statutes prohibiting, restricting and/or clarifying when and under what circumstances the Alliance can bind the federal government to third party contracts.
16. Any documents, policies, guidelines, regulations and statutes prohibiting, restricting and/or clarifying when and under what circumstances the Alliance can or cannot represent itself as or that it is operating on behalf of a federal agency.
17. Any documents, policies, guidelines, regulations or statute referencing what steps the Alliance should take to ensure it is not displacing or competing with the private sector in competing for contracts.
18. Any documents, policies, guidelines, regulations or statutes referencing conflicts of interest rules applicable to the Alliance or related [sic] its related companies namely Battel[le] and [MRI Global] in connection with entering into agreements.

Id. at 3.

The GFO issued a determination letter on February 2, 2023, explaining that the GFO released 803 pages of responsive documents redacted pursuant to FOIA Exemptions 4 and 6 and providing further justification for their response to each of the Appellant's requests. Determination Letter from GFO to CURE at 2 (Feb. 2, 2023).

The LADWP Contract is an Agreement for Commercializing Technology (ACT). The responsive documents provided by GFO to the Appellant which are the subject of this appeal include Alliance's cost development worksheets for the Riverside Contract and Alliance's additional cost development information for the Riverside Contract and the LADWP Contract, which GFO redacted pursuant to Exemption 4 and Exemption 6. Attachments 1–3 to Email 7 from GFO to OHA (May 10, 2023). The cost development worksheets and additional cost development information for the Riverside Contract were submitted by Alliance to GFO as part of a Proposal Approval Request (PAR) because under DOE Order 481.1D, a DOE Contracting Officer must grant approval if a DOE contractor wants to engage in outside contracts. Email from GFO Acquisitions Office to OHA and GFO (July 18, 2023); *See* DOE Order 481.1D (defining requirements and responsibilities for Strategic Partnership Projects). Additionally, since Alliance is a DOE contractor, Alliance provides GFO with updates regarding modifications that add or change funds in its outside agreements. Email from GFO Acquisitions Office to GFO and OHA (July 18, 2023); Attachment 3 of Email 7. GFO provided the cost development documentation to the Appellant with Exemption 4 and Exemption 6 redactions. *Id.*

In addition, GFO provided the Appellant with approval packages, redacted under Exemption 6, which Alliance had submitted to GFO for approval prior to Alliance entering into the LADWP Contract. Attachments 1–5 of Email 4 from GFO to OHA (May 10, 2023). Moreover, GFO released a redacted document that is a compilation of communications, including but not limited to email communications between Alliance and any Riverside employee or elected official concerning the Riverside Contract. Attachment 2 of Email 8 from GFO to OHA (May 10, 2023). As explained by GFO, where collaboration occurred that involved DOE, Alliance, and Riverside as it pertains to the contract negotiation process, those particular communications were government-owned records that were disclosed with applicable Exemptions 4 and 6 redactions. Email from GFO to OHA (July 18, 2023).

The Appellant timely appealed the determination letter on May 4, 2023. Appeal Letter Email from CURE to OHA at 1 (May 4, 2023). In its appeal, the Appellant challenges the withholding of the documents pursuant to Exemptions 4 and 6, as well as a variety of inadequacies that they allege occurred in DOE's responses to some of Appellant's particular requests. *Id.* at 3–8. The Appellant argues (1) that the redactions made pursuant to Exemptions 4 and 6 were not appropriate, (2) that GFO's response to requests number 7, 8, 9, 10, and 11 was inadequate because it did not produce any emails or text messages in its response , (3) that GFO did not complete the portion of its request that was still in progress regarding requests number 13 and 14, (4) that GFO should provide further response to requests number 12, 15, 16, and 17 because the response that DOE does not complete research in response to FOIA requests and that the information is available in public documents is not adequate, and (5) regarding GFO's response to requests number 1, 2, and 3, it is not appropriate for GFO to withhold documents that are contractor-owned pursuant to the Prime Contract between DOE and contractor Alliance. *Id.*

II. Analysis

We address each argument in turn.

A. Exemption 4

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R.

§ 1004.10(b)(4). To be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial or financial," "obtained from a person," and "privileged or confidential." *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2362 (2019) (*Argus Leader*).

Turning to the requirement that the withheld information be "obtained from a person," it is well established that "person" refers to a wide range of entities, including corporations and partnerships. *See Nadler v. FDIC*, 92 F. 3d 93, 95 (2d Cir. 1996) (quoting definition of "person" found in Administrative Procedure Act); *See also Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *Recticel Foam Corp. v. United States DOJ*, Civil Action No. 98-2523 (GK), 2002 U.S. Dist. LEXIS 29242 (D.D.C. Jan. 31, 2002) (referring to 5 U.S.C. § 551(2) in stating that the FOIA's definition of "person" includes "an individual, partnership, corporation, association . . . .").

Federal courts have held that the terms "commercial or financial" should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). That broad definition includes records that "reveal basic commercial operations, relate to the income-producing aspects of a business, or bear upon the 'commercial fortunes' of the organization." *Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 230 (D.D.C. 2017) (quoting *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312 at 319 (D.C. Cir. 2006)).

To determine whether information is confidential, the standard provided by the cases *National Parks & Conversation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), has been changed by the Supreme Court's decision in *Argus Leader*. In *Argus Leader*, the Supreme Court held that to determine whether financial or commercial information is confidential, the information must be the sort that is "customarily kept private, or at least closely held, by the person imparting it." *Argus Leader*, 139 S. Ct. at 2363. The Court went on to say, "[i]n another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.* Regarding whether information must be submitted to the government with some assurance that it will be kept private, the Court found that it did not need to resolve that question, as that condition was clearly satisfied in the case before it. *Id.* Thus, regarding the second prong of the confidentiality analysis, whether the government provided assurances that the information would be kept private, the Court in *Argus Leader* left open the question of whether this prong must additionally be satisfied. In *Gellman v. Dep't of Homeland Sec.*, 613 F. Supp. 3d 124 (D.D.C. 2020), the District Court for the District of Columbia, in noting that the Supreme Court has "left open whether such assurances are mandatory," made the decision to treat "the absence of evidence in the record of an assurance of confidentiality as one factor to be considered in determining whether the information meets the definition of 'confidential' under FOIA." *Gellman*, 613 F. Supp. 3d 124, 146 n.12. In *Gellman*, the Court found that "even though there was no evidence of an express assurance by [the Government] to the vendor that the information [it submitted] will remain confidential, the absence of such an assurance in this case does not change the outcome[,]" whereby they determined that the information submitted by the vendor was confidential. *Id.* at 146.

Here, the Appellant challenges the Exemption 4 redactions by arguing that "[t]he redacting of information under exemption (4) or (6), moreover, 'is not appropriate as the names of individuals at LADWP or the Alliance involved in the LADWP contract.'[sic] They are not confidential medical

records nor is this information intended to harass or embarrass anyone." Appeal at 3. In this case, the Exemption 4 redactions of the responsive documents consist of three types of information: videoconferencing passcodes ("passcodes"); cost development worksheets and additional cost development information; and portions of Alliance's Organizational Conflicts of Interest (OCI) Management Plan and Implementation Program (hereinafter "OCI Plan and Program") which were incorporated into the Prime Contract between DOE and contractor Alliance. Attachment 2 to Email 8 from GFO to OHA (May 10, 2023); Attachments 1–3 to Email 7 from GFO to OHA (May 10, 2023); Attachment 1 to Email 8 from GFO to OHA(May 10, 2023).

As stated above, we first look to whether the withheld portions of the responsive documents are considered "commercial or financial." GFO concurred with arguments made by Alliance as to their rationale for the Exemption 4 redactions as applied to all three types of information. Memorandum of Phone Conversation between OHA and GFO General Counsel (June 27, 2023); *See* Attachment 4 to Email 2 from GFO to OHA (May 9, 2023). Regarding the passcodes, GFO redacted passcodes from Alliance employees and City of Riverside Public Utilities Department (hereinafter "RPU") employees. Attachment 2 to Email 8 from GFO to OHA (May 10, 2023) at 111–12, 135, 227–28, 277, 358. GFO concurred with Alliance's argument in support of the Exemption 4 redactions whereby it argued that release of the passcodes would enable the Appellant and others to inappropriately participate in or monitor private conference calls that are meant for Alliance's use. *See* Memorandum of Phone Conversation between OHA and GFO General Counsel (June 27, 2023); Attachment 4 to Email 2 from GFO to OHA (May 9, 2023). However, GFO provided no other rationale in support of its Exemption 4 redactions for the passcodes. OHA reviewed the redacted passcodes, which were contained within emails sent from RPU employees and from Alliance employees and found that there was no clear indication as to how Alliance or GFO maintained an economic interest in these passcodes to satisfy the requirement for commercial or financial information. Because GFO has failed to show that Alliance's passcodes are commercial or financial information, we need not address the remaining Exemption 4 requirements regarding whether the passcodes are provided by a person, or whether they were confidential. As GFO has not established the first requirement, we cannot find that the passcodes were properly redacted under Exemption 4. Accordingly, we remand this portion of the Appeal for further processing by GFO to determine whether the passcodes are commercial or financial information and depending on its findings, to determine whether a different exception applies or to conduct further processing of the Appellant's FOIA request for this type of requested documents.

As we explained above, Alliance submitted cost development worksheets and additional cost development information for the Riverside Contract to GFO as required under DOE Order 481.1D. Regarding the cost development worksheets and additional cost development materials, a review of the redacted material reflects that it consists of financial worksheets from Alliance which reflect specific cost amounts associated with performing the terms of the prospective contract with RPU. Similarly, GFO also redacted additional cost development materials associated with the LADWP Contract. The redacted portions of those documents consist of proposed modifications showing costs for inclusion of additional deliverables in the LADWP contract. The cost development worksheets for the prospective RPU contract and the additional cost development materials associated with the LADWP contract directly relate to the income-producing aspects of contractor Alliance, thus making it commercial information. Moreover, information contained within these responsive documents are clearly financial. Therefore, we find that it is sufficient to render the information commercial or financial in nature.

As for the portions of the OCI Plan and Program, the Exemption 4 redactions consist of Alliance's methods for addressing organizational conflicts of interest at NREL. The withheld portions include details regarding the respective roles of Alliance leadership teams and senior management to assure effective OCI management at NREL, as well as Alliance's development of specific guidance used to identity, analyze, and address OCI issues at NREL. Additionally, the redacted portions include proprietary details of some of its business activities. The establishment of the roles of the contractor Alliance leadership teams and senior management as they pertain to addressing OCI issues, the guidance the contractor has developed to address OCI, and the details of its specific business activities reveal basic commercial operations. We therefore find that this information satisfies the requirement to qualify as commercial or financial in nature.

Turning to the requirement that the withheld information be "obtained from a person," the information that the Appellant challenges under Exemption 4 was submitted by Alliance, a private company, to GFO. Thus, we conclude that GFO obtained that information from a person.

We next address the requirement of whether the redacted documents were customarily treated as private such that they satisfy the first prong of the confidentiality analysis. Regarding the cost development worksheets and additional cost development information, the documentation provided by GFO reflects that the redacted information is customarily treated as private by Alliance. GFO's correspondence with Alliance reflects that Alliance reviewed the responsive documents prior to release, and identified its propriety cost information contained therein, which it specified is customarily and actually held in confidence. Attachment 4 to Email 2 from GFO to OHA (May 9, 2023) at 5. We find that the above documentation sufficiently demonstrates that the cost development worksheets and additional cost development information submitted by Alliance to GFO was customarily and actually treated as private by its owners.

As for the OCI Plan and Program, the correspondence between GFO and Alliance states that Alliance does not make this information publicly available as noted by the fact that the OCI Plan and Program was not included as part of the publicly available Management and Operating (M&O) contract with NREL.[2] *Id.* Moreover, the document itself states, "This plan contains confidential commercial and/or business sensitive information throughout the document which shall not be disclosed outside the Government . . . and shall not be . . . disclosed for any purpose other than for Government evaluation or use." Attachment 2 to Email 5 from GFO to OHA (May 10, 2023) at 1. Based on the above information including the restrictive markings made on the OCI Plan and Program document, we also find that the first prong of the confidentiality analysis is met for this redacted document.

Turning to the matter of whether GFO provided an assurance of confidentiality, consistent with *Gellman*, we treat the absence of evidence of an assurance of confidentiality as one factor to consider in whether the redacted information is "confidential" under FOIA. Regarding the cost development documents, when Alliance submitted that information to GFO pursuant to the Appellant's FOIA request, GFO gave no indication that the information would be disclosed, and by not explicitly stating whether the information would be protected, it has effectively been silent. As in *Gellman*, having determined the submitter's practice of keeping the information private, we conclude that the absence

[2] "An M&O contract is an agreement under which the Government contracts for the operation, management, . . . on its behalf, of a Government-owned or controlled research, development . . . . establishment wholly or principally devoted to one or more major programs of the contracting Federal agency." DOE G 413.3-20 at Section 3.3.3 Change Control under M&O Contracts.

of assurances by GFO does not disturb our above finding that the cost development information is confidential. Similarly, as explained above, we have also determined that Alliance held private its OCI Plan and Program and thereby satisfied the first prong of the confidentiality analysis. Additionally, we note that in GFO's correspondence with Alliance, GFO recognized that Alliance had not initially provided the OCI Plan and Program in response to the FOIA request because Alliance customarily keeps this information private. *See* Attachment 4 to Email 2 from Dan Dial to Brenda Balzon (May 9, 2023) at 7. Ultimately, Alliance agreed to provide GFO with the OCI Plan and Program with the understanding that Alliance would clearly indicate that this commercial information is private and marked it as being protected under Exemption 4. *Id.* We note that even if there was no evidence that GFO gave assurances to Alliance that the information it submitted will remain confidential, the absence of such an assurance in this case does not change our determination that the OCI Plan and Program is confidential under Exemption 4 as the submitted information satisfies the first prong of the confidentiality analysis. *See, e.g., In the Matter of Aerotest Operations, Inc.,* Case No. FIA-23-0020 at 2–3 (2023) (finding that "the lack of an assurance of confidentiality is not determinative" of whether information is "confidential" under Exemption 4, and that there was no indication that DOE erred when it concluded that other factors sufficiently indicated that the information was confidential such that DOE's Exemption 4 withholdings were appropriate).

Accordingly, we conclude that GFO properly applied Exemption 4 to redacted information in the OCI Plan and Program and in the cost development sheets and additional cost development information.

B. Exemption 6

Exemption 6 of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As a threshold matter, the record must be personnel, medical, or other similar files. *Id.* A record is a "similar file" when it "contains personal information identifiable to a particular person." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 175 (2d Cir. 2014). The Supreme Court has noted that Congress intended "the phrase 'similar files' [] to have a broad, rather than a narrow, meaning." *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982).

After it is determined that the information falls into one of those categories, the agency must first determine whether the disclosure of the record would compromise a significant privacy interest. *Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If no such privacy interest exists, then the agency may not withhold the record based on this exemption. *Id.* If the agency determines that a privacy interest does exist in the record, the agency must then decide if the release of the record would serve the interest of the public by shedding "light on an agency's performance of its statutory duties . . . ." *Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989).

The agency must then determine whether "the potential harm to privacy interests from disclosure [would] outweigh the public interest in disclosure of the requested information . . . ." *Ripskis,* 746 F.2d at 3. The interests must be balanced by determining whether "disclosure would compromise a substantial, as opposed to a de mimimis, privacy interest," and, if so, "whether the public interest in disclosure outweighs the individual privacy concerns." *Am. Oversight*, 311 F. Supp. 3d at 345 (internal quotations omitted). It is well-established that individuals' names, phone numbers, and email addresses, as well as names of organizations, can be considered privacy information covered by Exemption 6. *Skinner v. Dep't of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

The public interest must relate to shedding light on the Government's activities. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 878-79 (D.C. Cir. 1989). If the public would not learn something about "what the Government is up to" from the exact information at issue, there is no public interest in disclosure. *Id.* Any threat to privacy that is not de minimis prevails when no public interest in disclosure is presented. *Pinson v. DOJ*, 177 F. Supp. 3d 56, 89 (D.D.C. 2016).

Public oversight of government activities can be a legitimate public interest, particularly when considering the FOIA's purpose of shedding light on government activities. *Ctr. for Pub. Integrity v. Dep't of Energy*, 613 F.Supp.3d 310, 324 (D.D.C. 2020). However, there are limits on how significant the interest in public oversight is. *Id.* For example, there is minimal public interest in the names of low-level employees, but a substantial privacy interest in the same. *Id.* at 324–25.

Here, the Appellant contends that "[t]he redacting of information under exemption (4) or (6), moreover, is not appropriate as the names of individuals at LADWP or the Alliance involved in the LADWP contract. They are not confidential medical records nor is this information intended to harass or embarrass anyone." There is no dispute that these records qualify as "personnel" or "similar" files, so the appropriateness of redaction of documents pursuant to Exemption 6 depends on the nature of the privacy interest involved and the nature of the public interest in disclosure. All individuals have a privacy interest in their name and contact information, regardless of the intent of a requestor. *Skinner*, 806 F. Supp. 2d at 113. While members of the public, including the Appellant, may have a legitimate public interest in learning the names of decision-makers and executive level contract employees, there is minimal public interest in learning the names of low-level employees. When asked if any distinction was made between higher and lower-level employees when GFO was considering its redactions, GFO responded that they "typically room all non-government names and contact information" pursuant to Exemption 6. Email from GFO to OHA (May 25, 2023). As there is no indication here that GFO attempted to distinguish between different types of contract employees, we remand here for them to consider whether each name redacted was appropriate as outlined in *Ctr. for Pub. Integrity*, 613 F.Supp.3d at 324–25.

C. Adequacy of GFO's Responses

Appellant alleges that GFO's responses to some of Appellant's particular requests were inadequate based on Appellant's disagreements regarding the contents of the responsive documents or the rationale provided in certain responses from GFO. Appellant's arguments pertain to four different types of requests: production of emails regarding requests number 7, 8, 9, 10, and 11; "in search" requests regarding requests number 13 and 14; requests for statutes, regulations, and other federal law pertaining to requests number 12, 15, 16, and 17; and requests for contractor-owned documents regarding requests number 1,2, and 3. Below, we address each argument in turn as applied to its corresponding type of request.

1. GFO's Response to Request Numbers 7, 8, 9, 10, and 11(Production of Emails)

Appellant alleges that GFO did not produce "a single email or text message" in response to requests number 7, 8, 9, 10, and 11. Appeal at 5. In our review of the documents that GFO produced[3] in response to these requests, we found several emails containing the requested communications. *See, e.g.*, Attachment 2 to Email 8 from GFO to OHA (May 10, 2023) at 1–3, 75, 77–112, 134–44, 156, 168–70, 193, 217–49, 264–91, 317–48, 358–63, 366–78, 388–400, 425–26, 452–53, 483–94, 584–85, 645–63, 668–72, 687–98. As such, we consider Appellant's claim on this issue to be frivolous, and GFO's response to the aforementioned requests to be adequate.

2. GFO's Response to Requests Numbers 13 and 14 ("In Search" Requests)

Appellant further implies that they did not receive a response to their requests number 13 and 14, saying "[w]e have not received any documents since February 9, 2023." Appeal at 6. While it does appear to be accurate that Appellant has not received any documents from GFO since February of 2023, we find that they did receive a response to requests number 13 and 14 on February 8, 2023. Email from GFO to CURE (Feb. 8, 2023). In addition to providing those responsive documents, the email stated that it "conclude[d] GFO's response to your request." *Id.* When reviewing the responsive documents provided by the Appellant, we found the February 8 email that contained GFO's response to requests number 13 and 14, showing that the Appellant had in fact received those documents. Since GFO provided responsive documents regarding Appellant's requests number 13 and 14, which Appellant has received, we find that this argument is moot.

3. GFO's Response to Requests 12, 15, 16 and 17 (Statutes, Regulations, and Other Federal Law)

Appellant asserts that it is not asking GFO to perform legal research in response to Appellant's requests for statutes, regulations, and other federal law that restricts Alliance from competing with private companies for offering similar services, and which clarifies when and under what circumstances Alliance can bind the federal government to third party contracts. When responding to a request for information filed under FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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. "The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Jennings v. DOJ*, 230 F. App'x 1, 1 (D.C. Cir. 2007) (internal quotation marks omitted). If a search was conducted reasonably depends on the facts of each case, and if it is evident that a search was conducted inadequately, we do not hesitate to remand a case back to the agency. *See, e.g., In the Matter of Ayyakkannu Manivannan*, Case No. FIA-17-0035 (2017); *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 497 (D.D.C. 2017) (citing *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

Asking an agency to identify and list regulations based on a description in a FOIA request is asking an agency to complete research. *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 64 (D.D.C. 2003). Similarly asking for an agency to identify statutes is asking an agency to complete research.

[3] In order to ensure that our review of the documents accurately reflected the documents that the Appellant received, we asked both GFO and the Appellant to provide us with the responsive documents in their possession. Both sets of documents contained emails that were responsive to the requests.

See Allnutt v. DOJ, No. CIV. Y-98-1722, 2000 WL 852455, at 12–13 (D. Md. Oct. 23, 2000) (stating that the plaintiff's request "would have required the IRS to conduct legal research to determine which resolution, decision or statute he was seeking"). GFO was not required to compile or create any list of the "statute, guideline, policy, or regulations" requested by the Appellant. It was required to provide any documents that it found in a "reasonable search for records." Further, a requestor is "entitled to a reasonable search for records, not a perfect one." *Hamdan v. DOJ*, 797 F.3d 759, 772 (9th Cir. 2015). GFO is not obligated to point out specific portions of that document that are responsive to the request or conduct additional searches if its employees attest that to their knowledge the information sought would be in the documents that have already been provided as they did in the Determination Letter. We cannot find, and Appellant does not cite, any statute, regulation, or case law that would require GFO to provide the specific answers that Appellant is seeking.

4. GFO's Response to Requests 1, 2, and 3 (Contractor-Owned Documents)

In *Dep't of Justice v. Tax Analysts*, the Court decided that records are "agency records" subject to FOIA if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. 492 U.S. 136, 144–45 (1989). To determine if an agency has control of records, we consider four factors:

(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.

Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C. Cir. 1996); *see also In the Matter of Nuclear Watch New Mexico*, Case No. FIA-13-0060A (2013) (*Nuclear Watch*).

Appellant argues that DOE cannot withhold records made by a "long-term government contractor operating a government facility and performing business on government owned computers." Appeal at 3. GFO contends that because the M&O contract designates certain records as contractor-owned, neither GFO or the DOE have control over those records, and those records cannot be subject to FOIA. Memorandum of Phone Conversation between OHA and GFO General Counsel (June 27, 2023).

The Appellant does not contend that the records that they asked for in request numbers 1, 2, and 3 were created by the agency, nor that the records were obtained by the agency. At the time that GFO received Appellant's FOIA request, the requested records were in the possession and control of contractor Alliance. Attachment 1 to Email 1 from GFO to OHA (May 9, 2023). There is no indication that (1) Alliance intends to relinquish its control over the records, (2) the DOE has the ability to use or dispose of the documents as it sees fit, (3) DOE's personnel read or relied upon the records, or that (4) the documents are integrated into DOE systems or files. *See Nuclear Watch New Mexico*, Case No. FIA-13-0060A-0020 at 2–3 (2013) (applying the *Burka* factors to find that the requested documents were not "agency records").

We turn next to the contract provisions of the M&O contract between DOE and Alliance to determine whether GFO properly applied the contract provisions in its determination that the requested

documents are contractor-owned documents that are not subject to FOIA. The M&O contract contains Clause H.42 entitled "Agreements for Commercializing Technology" (ACT Agreements), which authorizes Alliance to enter into ACT Agreements with outside entities.[4] DOE Contract DE-AC36-08GO28308, Clause H.42. The M&O contract states:

> all records associated with the M&O Contractor's activities conducted under the authority of this H-clause, with the exception of information required under paragraphs 3e, 4.B.i, and 13 shall be treated as M&O Contractor-owned records under the provisions of the Access to and Ownership of Records clause of this M&O contract.

Id. at Section 10. Applying the H.42 contract clause to GFO's determination, it is clear that the requested LADWP Contract, the requested records pertaining to subcontracts that Alliance entered into as part of the LADWP Contract, and the requested change orders of the LADWP Contract are all ACT Records pursuant to Section 10 of Clause H.42, and are therefore Contractor-owned records.[5] Accordingly, these records are not "agency records" that are subject to FOIA. *See Nuclear Watch* at 3 (holding that NNSA properly denied the appellant's FOIA request based on its application of the relevant contract provisions which reflected that the requested documents were the property of the contractor, and its determination that the DOE had not claimed ownership of the records in its contract with the contractor).

Additionally, the Appellant asserts that their Appeal of DOE (GFO's) decision to withhold records from a private contractor presents "issues of first impression not previously considered by the courts." Appeal at 3. Specifically, Appellant argues that OHA should decide "whether Congress delegated to DOE the discretion to waive and/or not include the requirement that contractors comply with FOIA in contracting with long-term government contractors . . . ," and Appellant asserts that "DOE did not have discretion to contract around its obligations when, if fact [sic], it controls [the requested] documents." *Id.* We find that argument is inapposite. As explained above, we find that the withheld records were not under DOE's control, and therefore were not "agency records" for FOIA purposes. Our review of Clause H.42 of the M&O contract reflects that GFO correctly concluded that based on the H.42 contract clause, the LADWP contract is an ACT Agreement which is treated as a contractor-owned record not subject to disclosure under the FOIA. *See* Determination Letter at 3–4. We find that GFO correctly concluded that the documents requested in request numbers 1, 2, and 3 are a contractor-owned document not subject to FOIA.

Accordingly, for the foregoing reasons, we grant the present Appeal in part and refer the matter to GFO for further processing with respect to GFO's Exemption 6 redactions and portions of the

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[4] As described in pertinent part under the M&O Contract at Clause H.42, an ACT Agreement allows a DOE M&O Contractor to engage in agreements with outside entities concerning commercialization of technology such that the M&O Contractor can "conduct third-party sponsored research at the M&O Contractor's risk." DOE Contract DE-AC36-08GO28308, Clause H.42.

[5] In response to Appellant's request number 3, GFO found that while any change orders for the LADWP Contract (if they exist) would also be "ACT Records" not subject to FOIA, the GFO provided five "ACT Approval Documents" (the "approval packages") which Alliance had previously submitted to GFO to obtain GFO Contracting Officer approval prior to entering into the LADWP ACT Agreement. Determination Letter at 3; Attachments 1–5 to Email 4 from GFO to OHA (May 10, 2023). These documents were disclosed because Clause H.42 at paragraph 4.b.i of the M&O contract specifically excludes ACT proposal packages from being treated as M&O Contractor owned records. Attachment 1 to Email 1 from GFO to OHA (May 9, 2023).

Exemption 4 redactions as explained above. On remand, the GFO should issue a new determination consistent with this Decision.

III. Order

It is hereby ordered that the appeal filed on May 4, 2023, by Citizens United for Resources and the Environment, FIA-23-0016, is granted in part and denied in all other aspects. This matter is hereby remanded to the GFO, which shall issue a new determination in accordance with the above 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. § 522(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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Poli A. Marmolejos
Director
Office of Hearings and Appeals