

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

In the Matter of Sabine Lauer	)	
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Filing Date: June 7, 2016	)	Case No.: FIA-16-0035
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Issued: June 17, 2016

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**Decision and Order**

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On June 7, 2016, Sabine Lauer (Appellant) appealed a determination that she received from the Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) on May 3, 2016 (Request No. FOIA 15-00173-R). 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 DOE in 10 C.F.R. Part 1004. The Appellant challenges NNSA’s finding that the requested records are contractor-owned. As explained below, we have determined that the Appeal should be denied.

**I. Background**

On April 13, 2015, the Appellant requested “any and all documents signed by Charlie McMillan and by Human Resource Division Leader of Los Alamos National Security for Reduction in Force Termination of Sabine Lauer during 2012 and 2013.” Determination Letter from Jane Summerson, Denying Official, NNSA to Sabine Lauer (May 3, 2016). On May 3, 2016, NNSA issued a determination letter in which it informed the Appellant that the requested documents were “contained in records in the possession and control of Los Alamos National Laboratory, the management and operation contractor for Los Alamos Field Office, and are therefore, not ‘agency records’ subject to the provision of the FOIA.” *Id.*

On June 7, 2016, the Appellant appealed the Determination Letter, citing Clause I-133 of the contract between DOE and Los Alamos National Laboratory (LANL), in support of her assertion that NNSA is “entitled to inspection of all books of account and records relating to this contract,” and therefore, NNSA should obtain and release the sought documents. Appeal Letter from Sabine Lauer to OHA Filings (June 6, 2016).

## II. Analysis

In this case, NNSA determined that the documents requested were not agency records subject to the FOIA. The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record. The United States Supreme Court has articulated a two-part test for determining what constitutes an agency record. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). An agency record is a record that is (1) created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Id.* We contacted NNSA and confirmed that the Los Alamos Field Office (LAFO) searched its records for responsive documents and did not find any. Memorandum of Telephone Conversation between Kari Martinez, NNSA, and Brooke DuBois, OHA (June 13, 2016). Because NNSA did not have the requested records under its control at the time of the FOIA request, the requested records are not agency records. Los Alamos National Security (LANS), which operates LANL, also conducted a search of its records and informed NNSA that the requested records were contractor-owned and therefore not releasable under the FOIA.<sup>1</sup> *Id.*

A finding that certain documents are not agency records does not end our inquiry. DOE's FOIA regulations state: When a contract with the DOE provides that any records acquired or generated by the contractor in the 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 the FOIA. 10 C.F.R. § 1004.3(e).

In the Appeal, the Appellant points to Clause I-133 of the contract between DOE and LANS, which she believes is relevant because it allows inspection of all books of account and records relating to this contract. DOE Contract No. DE-AC52-06NA25396 (DEAR 970.5235-3 ACCOUNTS, RECORDS, AND INSPECTION).<sup>2</sup> The Appellant however is incorrect in her reliance on this clause of the contract. Despite allowing DOE to inspect contractor records, this clause does not convert contractor-owned records into agency records. In fact, Clause I-78 of the contract between DOE and LANS specifically indicates that employment records like those requested by the Appellant are the property of the contractor. DOE Contract No. DE-AC52-06NA25396 (DEAR 970.5204-3 ACCESS TO AND OWNERSHIP OF RECORDS). Subsection (b) of this Clause states "[t]he following records are considered the property of the contractor ... (1) Employment-related records (such as ... personnel and medical/health-related records and similar files)...." *Id.* The Appellant requested documents relating to her termination, which is clearly covered by Clause I-78 of the contract and is contractor-owned and not subject to the FOIA.

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<sup>1</sup> LANS also informed NNSA that the Appellant can obtain her personnel file by contacting LANL directly at:

Personnel Records and Operations Team  
PO Box 1663, MS P235  
TA-3 Otowi (Bldg 261) Room S 232  
Los Alamos, NM 87545  
phone: 505-667-4451  
fax: 505-667-6446  
email: personnel@lanl.gov

<sup>2</sup> This contract can be found at: <https://nnsa.energy.gov/aboutus/ouoperations/apm/mosupportdept/lanl>

### III. Conclusion

Based on the foregoing, we find that the requested documents are contractor-owned and therefore the FOIA does not apply. We have further found that DOE regulations do not provide for the release of this information. Accordingly, we will deny the present Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed on June 7, 2016, by Sabine Lauer, Case No. FIA-16-0035, is hereby denied.
- (2) 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.
- (3) 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 your right to pursue litigation. You may contact OGIS 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: [ogis.archives.gov](http://ogis.archives.gov)  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770  
Fax: 202-7415769  
Toll-free: 1-877-684-6448

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

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