

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

In the Matter of Phillip B. Isaacs)	
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Filing Date: August 30, 2016)	Case No.: FIA-16-0048
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Issued: September 20, 2016

Decision and Order

On August 30, 2016, Phillip B. Isaacs (Appellant) appealed a determination that he received from the Department of Energy’s (DOE) Richland Operations Office (DOE-RL) on August 3, 2016. (Request No. FOI 2016-00828). In that determination, DOE-RL 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 the DOE-RL finding that the requested documents are not agency records and therefore not subject to the FOIA. As explained below, we have determined that the Appeal should be denied.

I. Background

On April 22, 2016, the Appellant requested copies of “communications of any kind between Mission Support Alliance, LLC (MSA) and the U.S. Department of Energy (DOE), Richland Operation Office (RL) concerning Enterprise Company employee appeals of the benefit received from the Hanford Multi-Employer Pension Plan, Hanford Operations, and Engineering.” Determination Letter from Dorothy Riehle, FOIA Officer, DOE-RL, to Phillip Isaacs (June 17, 2016). On June 17, 2016, DOE-RL provided a partial response to the Appellant indicating that DOE-RL identified responsive documents that are not subject to the FOIA because these documents are not agency records. *Id.* This letter also informed the Appellant that DOE-RL had exhausted the two free hours of search time to which the Appellant was entitled and indicated that DOE-RL estimated that it would need four more hours of search time to complete its search. *Id.*

On June 26, 2016, the Appellant agreed to pay for additional search time, and on August 3, 2016, DOE-RL provided the Appellant with a final response. Determination Letter from Dorothy Riehle, FOIA Officer, DOE-RL, to Phillip Isaacs (August 3, 2016). In this determination letter, DOE-RL stated that no other responsive documents were located outside of the documents identified as not

agency records in the previous determination letter. *Id.* On August 30, 2016, the Appellant appealed the determination that the documents identified in the June 17, 2016, Determination Letter were not agency records. Appeal Letter from Phillip Isaacs (August 15, 2016).

II. Analysis

In this case, DOE-RL determined that the requested documents 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.* The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

- (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.

See, e.g., Burka v. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996); *see also In the Matter of Ralph Stanton*, OHA Case No. FIA-13-0048 (2013).¹

In the present matter, it is undisputed that DOE-RL obtained the requested documents, satisfying the first element of the test described above. This requires us to proceed to the second element and determine whether or not the documents were under the control of DOE-RL at the time of the FOIA request. According to DOE-RL, DOE-RL received the requested documents for information purposes only. Email from Dorothy Riehle, FOIA Officer, DOE-RL, to Brooke DuBois, Attorney-Advisor, OHA (September 13, 2016). These documents concern the facts and circumstances relating to Hanford Multi-Employer Defined Benefit Pension Plan appeals. *Id.* The documents were emailed to their primary audience and the Plan Committee for the Hanford Multi-Employer Defined Benefit Pension Plan², then copied to DOE-RL. *Id.* DOE-RL, however, had no obligation to reply or respond to these emails. *Id.* DOE-RL further stated that it did not utilize or rely upon these documents for any decision-making process. *Id.* DOE-RL also informed us that it did not integrate these documents into DOE-RL's record systems or files and that it did not provide these documents to correspondence control. *Id.* These documents were located in this FOIA search only because they were in a federal employee's email account. *Id.* We find, based on the factors outlined above, that DOE-RL did not have control of the requested documents. Given that DOE-RL did not

¹ Decisions issued by OHA are available on the OHA website located at <http://energy.gov/oha>.

² The Plan Committee is a non-federal organization with jurisdiction and authority to hear benefit appeals by certain non-federal employees.

have control of the requested documents at the time of the FOIA request, we agree with DOE-RL's finding that these documents were not agency records and therefore not subject to the FOIA.

III. Conclusion

Based on the foregoing, we find that the requested documents are not agency records and therefore the FOIA does not apply to them and does not require their disclosure. Accordingly, we will deny the present Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed on August 30, 2016, by Phillip B. Isaacs, Case No. FIA-16-0048, 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.

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Director
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