

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

In the Matter of: Preston P. Straub)
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Filing Date: March 29, 2012)
) Case No.: FIA-12-0011
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Issued: April 18, 2012

Decision and Order

On March 29, 2012, Preston P. Straub appealed a determination issued to him on February 14, 2012, by the Chicago Office of the Department of Energy (DOE). The Chicago Office had responded to a request that Mr. Straub had 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 Chicago Office located two documents but found that they are not agency records subject to release under the FOIA. This Appeal, if granted, would require the Chicago Office to review the requested documents as agency records and either release them or justify their withholding under the FOIA.

I. Background

UChicago-Argonne, LLC (UCA), a private contractor, manages and operates the Argonne National Laboratory for the DOE. Mr. Straub filed a FOIA request for “copies of any emails sent by [a particular UCA employee] on November 14th or 15th [of] 2011 which contain my name.” Determination Letter at 1. Mr. Straub specified the division where the employee works and the e-mail address that the employee used. *Id.*

The Chicago Office denied Mr. Straub’s FOIA request. It stated that the UCA found two documents. Determination Letter at 1. But the Chicago Office withheld them because they “are personal records, not agency records subject to [the] FOIA.” *Id.* The documents consist of two e-mails that a contractor employee sent, using the contractor’s e-mail program, only to private individuals outside of the government. E-mails from Mimi R. Bartos, FOIA/ PA Officer, Chicago Office, Department of Energy, Mar. 29, 2012 and April 9, 2012. The e-mails were not accessed by any other agency employee or contractor employee. *Id.*

On appeal, Mr. Straub states that the Chicago Office “erred” in withholding the documents. Appeal Letter at 1. He argues that he has a “fundamental right to [a] copy” of the e-mails

because they (1) were “published from a .gov” e-mail address; (2) contain his name “for no proper governmental reason;” and (3) are not classified. *Id.*

II. Analysis

A. Whether the Documents at Issue are Agency Records – Subject to the FOIA – or Personal Records

Under the FOIA, an agency need only release agency records. *See 5 U.S.C. § 552(a)(4)(B).* It need not release personal records. *Id.* Here, we determine whether the requested e-mails are agency records or personal records.

The FOIA does not define “agency records.” Instead, it lists examples of the types of information that agencies must make public, such as final opinions and administrative staff manuals. *See 5 U.S.C. §§ 552(a)(2)(A), (C).* Personal records, on the other hand, are documents created by an agency employee but not attributable to the agency for purposes of the FOIA. *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1489 (D.C. Cir. 1984).

To distinguish agency records from personal records, we evaluate the “totality of the circumstances.” *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006); *accord BPA Watch*, Case No. TFA-0263 (2008).¹ To evaluate the totality of the circumstances, we examine the creation, possession, control, and use of the document by an agency. *Consumer Fed'n of Am.*, 455 F.3d at 287 (citing *Bureau of Nat'l Affairs, Inc.*, 742 F.2d at 1490).

In *Consumer Fed'n of Am.*, the federation asked the U.S. Dep't of Agriculture (USDA) to release portions of the electronic appointment calendars of six agency officials. *Consumer Fed'n of Am.*, 455 F.3d at 285. (The federation sought the portions for “all meetings with non-government individuals, businesses, trade associations and/or other organizations[,] and the subject of the meetings.” *Id.*) Each of the six agency officials created and continually updated the electronic calendars on the USDA computer system to schedule meetings and prevent conflicts. *Id.* at 285-86, 292-93. Five of the calendars were distributed to agency secretaries, special assistants, and senior management. *Id.* at 286. The sixth calendar was distributed only to the employee’s secretary. *Id.*

The court found that the five calendars were agency records but that the sixth was not. *Consumer Fed'n of Am.*, 455 F.3d at 291-93. The five calendars were relied on by special assistants and senior management in running the daily operations of the USDA. *Id.* at 292. The sixth calendar was not similarly relied on in running daily operations; it was distributed to and relied on only by the employee’s secretary. *Id.* at 293. The court noted that its “focus on use helps to ensure that a document subject to disclosure under the FOIA is an agency record and not an employee’s record that happens to be located physically within an agency.” *Id.* at 292 (citation and internal quotations removed).

Here, the requested e-mails resemble all six calendars of *Consumer Fed'n of Am.* in that the e-mails were also created and stored on a computer system owned by an agency.² But the

¹ OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

² UChicago-Argonne, LLC operates and maintains the computer system, but the DOE owns it. E-mail from Mimi R. Bartos, FOIA/ PA Officer, Chicago Office, Department of Energy, April 9, 2012.

e-mails were created by a contractor employee, not an agency employee. And the computer system is possessed by a contractor, not an agency. Most importantly, unlike the five calendars of *Consumer Fed'n of Am.* that were found to be agency records, no other employee (agency or contractor) received the e-mails and relied on them to conduct agency business. The e-mails were distributed and relied on even less than the sixth calendar of *Consumer Fed'n of Am.*, which was distributed to and relied on by the employee's secretary and still found to be a personal record. Therefore, the totality of the circumstances shows that the requested e-mails are personal records, not agency records.

B. Mr. Straub's Arguments

As noted above, Mr. Straub argues that he has a "fundamental right" to the e-mails because they were sent from a government e-mail address, they contain his name for no "proper" purpose, and they are not classified. We address his arguments in turn.

The FOIA does not require disclosure of all e-mails sent from a government address. Next, the e-mails related to no government purpose, which supports our finding that they are personal records rather than agency records. Lastly, the FOIA does not require disclosure of all non-classified information.

III. Conclusion

The requested e-mails are personal records, not agency records subject to the FOIA. Therefore, we will deny Mr. Straub's Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Preston P. Straub, OHA Case No. FIA-12-0011, on March 29, 2012, 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 18, 2012