

records in the possession and control of M&O or prime contractors may be considered DOE property under specific circumstances, the contract between the DOE and Sandia Corporation “clearly defines” the requested records as the property of the contractor. *Id.* Therefore, NNSA denied the FOIA request.¹

Nuclear Watch filed the instant Appeal, disputing NNSA’s determination that the responsive records located at SNL were not subject to disclosure under the FOIA. Letter from Jay Coghlan, Executive Director, Nuclear Watch, and Scott Kovac, Operations and Research Director, Nuclear Watch, to OHA (received September 17, 2013) (Appeal). In its Appeal, Nuclear Watch contends that “government contracts do not supersede federal law, and there is ample case law that contractors records belong to the government and are therefore subject to the FOIA.” *Id.* at 1-2. Appellant also asserts that the contract between the DOE and Sandia Corporation does, in fact, define the documents in question as Government property, thereby rendering them subject to disclosure under the FOIA. *Id.* at 2-3. Finally, Appellant notes that the substance of the requested documents has been “a matter of great public interest.” *Id.* at 3.

II. ANALYSIS

The FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. The United States Supreme Court addressed this issue in *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are agency records for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. 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.

¹ In addition, in its Determination Letter, NNSA identified the DOE Office of the Inspector General (OIG) as another DOE office at which responsive records may be located and transferred the request to OIG for a search. Determination Letter at 2. On September 11, 2013, OIG issued a Determination Letter to the Appellant, in which OIG stated that a search of its records yielded two potentially responsive documents, which OIG referred back to NNSA for a review and release determination because the documents purportedly “did not fall within the purview of OIG.” The Appellant did not challenge the OIG Determination Letter in the instant Appeal. Therefore, the OIG determination falls outside the scope of this proceeding and will not be considered in this decision. However, while processing the instant Appeal, we have learned that NNSA has since released to the Appellant both documents that the OIG located in its records in their entirety.

See, e.g., Burka v. Dep't of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (2010).²

Turning to NNSA's determination in this case, there is no doubt that the requested records – documents pertaining to a 2009 consulting agreement between Sandia Corporation, a DOE M&O contractor, and a third-party firm – were not created or obtained by NNSA. In addition, based on the four-factor test noted above, the documents were not under NNSA's control at the time of the FOIA request. At the time that NNSA received Appellant's FOIA request, the requested records were in the possession and control of Sandia Corporation. *See* Memorandum of Telephone Conversation between Karen Laney, Information Programs Specialist, NNSA, and Diane DeMoura, Attorney-Examiner, OHA (October 4, 2013). There is no indication that (1) the contractor intends to relinquish its control over the records, (2) NNSA has any ability to use or dispose of the records as it sees fit, (3) NNSA personnel read or relied upon the records in any respect, or (4) the records have been integrated into NNSA's record system or files. Based on these factors, we find that NNSA properly concluded that the requested documents were not "agency records" at the time that the office received Appellant's FOIA request.

Nonetheless, 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 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).

10 C.F.R. § 1004.3(e). The contract between the DOE and Sandia Corporation states, in pertinent part, that "except as provided in paragraph (b) of this clause ["Contractor-owned records"], all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract." *See* DOE Contract No. DE-AC04-94AL85000 (Mod. M202)), Part II, Section I, I-73 (DEAR § 970.5204-3, "Access To And Ownership of Records"). The contract specifically identifies as property of the contractor "records relating to any procurement action by the contractor, except for records that under 48 C.F.R. § 970.5232-3, Accounts, Records, and Inspection, are described as property of the government."³ *Id.*

Applying the contract provisions to NNSA's determination, it is clear that the requested 2009 consulting agreement documents between Sandia Corporation and HWC were the property of the

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

³ Section I-95, DEAR § 970.5232-3, Accounts, Records, and Inspection, identifies as government property "all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract."

contractor, not NNSA, and they are not considered government records under the DEAR § 970.5204-3 (“Access To And Ownership of Records”). Further, the DOE has not claimed ownership of these types of records in its contract with Sandia Corporation under DEAR § 970.5232-3 (“Accounts, Records, and Inspections”). Accordingly, we conclude that the NNSA appropriately denied Nuclear Watch’s FOIA request in its Determination Letter.

It Is Therefore Ordered That:

(1) The Appeal filed on September 17, 2013, by Nuclear Watch New Mexico, OHA Case No. FIA-13-0060, 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 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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Poli A. Marmolejos
Director
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