

April 25, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Caroline C. Roberts

Date of Filing: March 17, 2003

Case Number: TFA-0023

On March 17, 2003 the Office of Hearings and Appeals (OHA) received an Appeal that Caroline C. Roberts filed from a determination issued to her by the Office of Public Affairs at the Department of Energy's (DOE) Albuquerque Operations Office (hereinafter referred to as "Albuquerque"). Albuquerque issued its determination in response to a request for information 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 Appeal, if granted, would result in the release of certain documents to Ms. Roberts.

I. Background

In her request, Ms. Roberts sought access to all documents relating to Computer One, Inc., to the requester herself, or to any one of five specified contracts. In its response to this request, Albuquerque stated that no responsive documents could be located in DOE files, but that many of the records requested "are in the possession and control of the Sandia Corporation, and are therefore not 'agency records' subject to the provisions of the FOIA." Determination Letter at 1. In its Appeal, Ms. Roberts contests Albuquerque's finding that the documents in question are not subject to the FOIA. Specifically, she contends that the documents "were in the possession of the Department of Energy and for that reason, they must be produced." Appeal at 1.

II. Analysis

The FOIA generally provides public access to federal agency records, except to the extent that such records, or portions of them, are protected from disclosure by one or more of the Act's exemptions. The appropriate test of whether a document is an agency record for purposes of the FOIA was set forth by the U.S. Supreme Court in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (*Tax Analysts*). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (i) were created or obtained by an agency, and (ii) are under agency control at the time of the FOIA request. The FOIA defines the term "agency" to include any "executive department, military department, Government corporation, Government controlled corporation, or

other establishment in the executive branch..., or any independent regulatory agency.” 5 U.S.C. § 552(f).

Under these criteria, the documents sought by Ms. Roberts clearly are not agency records. They are procurement and legal records maintained by Sandia Corporation (Sandia), and were generated by that company or its contractors. On a number of occasions, we have addressed the issue of whether Sandia is an “agency” for purposes of the FOIA. We have consistently held that it is not. *See, e.g., Helen Ruth Sutton-Pank*, 25 DOE ¶ 80,178 (1996). Ms. Roberts has not convinced us that this holding is in error. Sandia is a privately owned and operated entity, and is not an “agency” for FOIA purposes.

Moreover, contrary to Ms. Roberts’ assertion, we have been informed that the records in question are not now, and were not at the time of the request, in the possession of the DOE. *See* memorandum of April 15, 2003 telephone conversation between Robert Palmer, OHA staff attorney, and Carolyn Becknell, Albuquerque. Simply put, the record in this matter indicates that the requested documents were neither created nor obtained by a government agency, and therefore do not satisfy the first prong of the *Tax Analysts* test. Albuquerque correctly concluded that the documents are not agency records subject to the FOIA.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. “When a contract with 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 those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). The contract between Sandia and the DOE describes as contractor-owned records

(3) Records relating to any procurement action by the contractor, except for records that under 48 C.F.R. (DEAR) 970.5204-9 . . . are described as the property of the government; * and

(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges

We conclude that under this agreement, Sandia’s legal and procurement files are the property of Sandia, and are not subject to release under either the FOIA or the agency records regulation.

Ms. Roberts contends, however, that the agreement between the DOE and Sandia “cannot be used as a defense to the production of the documents simply because the agreement defines those records as belonging to Sandia.” Appeal at 1. We believe that this argument reflects a misunderstanding of

*We have also examined 48 C.F.R. 970.5204-9, and we conclude that the documents requested by Ms. Roberts are not described as government property in that regulatory provision.

the effect of 10 C.F.R. § 1004.3(e)(1). Contrary to Ms. Roberts' argument, this regulatory provision expands the scope of documents that are subject to disclosure. Under the *Tax Analysts* test, "agency records" must (i) have been originated or obtained by an agency, and (ii) be under an agency's control at the time of the FOIA request. However, pursuant to 10 C.F.R. § 1004.3(e)(1), contractor records that do not meet these criteria are still subject to disclosure as long as the contract between the contractor and the DOE provides that the records are government property. We therefore reject Ms. Roberts' argument concerning Albuquerque's application of that regulation.

III. Conclusion

Albuquerque correctly determined that the documents at issue are not agency records, and are not subject to disclosure under the FOIA or under 10 C.F.R. § 1004.3(e)(1). We will therefore deny Ms. Roberts' Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Caroline C. Roberts on March 17, 2003 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 located, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2003

