October 14, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph M. Santos

Date of Filing: July 9, 2004

Case Number: TFA-0065

On July 9, 2004, Joseph M. Santos filed an Appeal from a determination that the Department of Energy (DOE) issued to him. The determination responded to a request for information 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. In the determination, DOE released some responsive information to Santos. This Appeal, if granted, would require DOE to release the remainder of the responsive information.

I. Background

Mr. Santos filed a request in which he sought a copy of his Official Personnel File as well as copies of all e-mails, records and documents that pertain to him written between January 1, 1999, and the present, from DOE employees Stephen Durbin, Barbara Hall, Ray Madden, Al Knight, Dave Schoeberlein, Kyle McSlarrow, Guy Caruso, Howard Grenspecht and Mary Hutzler.

On June 30, 2004, DOE issued a determination letter regarding Mr. Santos' request. DOE's determination letter stated that Mr. Santos' request had been assigned to six offices at the DOE Headquarters to conduct a search of their files for responsive documents. Those offices were the offices to which the individuals Mr. Santos named in his request were assigned. They included the Office of Congressional, Public and Intergovernmental Affairs, the Office of the Deputy Secretary, the Energy Information Administration, the Office of Human Resources Management, the Office of Inspector General and the Office of Policy and International Affairs. See Determination Letter.

The Office of Human Resources Management completed its search for responsive documents and identified Mr. Santos' Official Personnel File, which the office provided to Mr. Santos in its entirety. With respect to the other portion of Mr. Santos' request, in its response the Office of Congressional, Public and Intergovernmental Affairs (CI) informed DOE that "any records in the possession of Mr. Al Knight [a CI employee] are not agency records" and further that "any

records maintained by Mr. Knight that may be related to the subject of your request were generated or obtained in his capacity as an union official." CI concluded that the Al Knight records are not in the possession or control of the DOE and, therefore, are not agency records subject to the provisions of the FOIA. Id.

On July 9, 2004, Mr. Santos filed his Appeal with the Office of Hearings and Appeals. In his Appeal, Mr. Santos challenges the adequacy of the search conducted by DOE. He alleges that his Official Personnel File did not include any SF-50 notices of personnel action or other related documents. In addition, Mr. Santos challenges DOE's determination that records maintained by Al Knight and other NTEU (union) officers are not agency records. *See* Appeal Letter. *

II. Analysis

A. Agency Records

Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. *Department of Justice v. Tax Analysts,* 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and when it was used for an agency purpose. *Kissinger v. Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980); *Bureau of Nat'l Affairs, Inc. v. Department of Justice* 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (*BNA*); *J. Eileen Price*, 25 DOE ¶ 80,114 (1995) (*Price).* In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. *See BNA*, 742 F.2d at 1492-93*; Price.*

With regard to the potentially responsive documents in possession of Al Knight and other NTEU officers, DOE has stated that any records maintained by Mr. Knight that may be related to the subject of Mr. Santos' request were generated or obtained in Mr. Knight's capacity as an union official and were not in the possession or control of DOE. DOE has further informed us that union officials segregate their records from official DOE business. Our understanding of the circumstances surrounding the records in Mr. Knight's possession responsive to Mr. Santos' request is that those records were created or obtained by DOE employees on DOE premises. However, those DOE employees were not acting in their capacities as DOE employees but rather as union officials, performing functions distinct from their DOE position descriptions and maintaining such records separately from any DOE records. *See* Memorandum of telephone conversation between Abel Lopez, Director, DOE Headquarters FOI and Privacy Branch, and Kimberly Jenkins-Chapman, OHA (September 2, 2004). Further, it is our understanding that the DOE has no power to create, alter, or destroy any records generated by the union officials.

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* At the time of Mr. Santos' appeal, the Office of the Deputy Secretary, the Energy Information Administration, the Office of the Inspector General and the Office of Policy and International Affairs had not yet responded to his request for information. Mr. Santos' appeal is limited to the determinations of the two offices that did respond.

Applying the *Tax Analysts* standard described above to any relevant records generated in the course of union operations, those records were not "created or obtained" by the DOE, nor have they ever been under DOE control. Consequently, we find that any responsive documents in the possession of Al Knight and other union officials that were generated in their capacities as union officials and were used for exclusively union operations are not agency records and therefore are not subject to disclosure under the FOIA.

B. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search was in fact inadequate. *See, e.g., Alice McMillan,* 28 DOE ¶ 80,118 (2004). To determine whether an agency's search was adequate, we must examine its actions under a "standard of reasonableness." *McGehee v. CIA,* 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing,* 711 F.2d 1076 (D.C. Cir. 1983). This standard "does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State,* 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. NSA,* 610 F.2d 824, 834 (D.C. Cir. 1979).

We contacted the relevant DOE office to determine the extent of the search that had been conducted for responsive documents. *See* Memorandum of telephone conversation between Adrienne Martin, DOE, and Kimberly Jenkins-Chapman, OHA (July 7, 2004). DOE informed us that upon receipt of the request it contacted six offices at the DOE Headquarters to conduct a search of their files for responsive documents. The Office of Human Resources Management completed its search for responsive documents and located the Official Personnel File of Mr. Santos. DOE has informed us that the personnel documents referred to in Mr. Santos' appeal would be located in his Official Personnel File if they existed. According to DOE, this file was provided to Mr. Santos in its entirety. Given the facts presented to us, we believe that those DOE offices that have completed their searches have conducted adequate searches for documents responsive to Mr. Santos' request.

III. Conclusion

In sum, we find that, to date, DOE has conducted an adequate search for documents responsive to Mr. Santos' FOIA appeal. Further, any responsive union documents used exclusively for union purposes are not agency records for the purposes of the FOIA. Thus, Mr. Santos' appeal will be denied.

It is Therefore Ordered That:

(1) The Appeal filed by Joseph M. Santos on July 9, 2004, OHA Case No. TFA-0065, is hereby denied.

(2) This is a final order of the Department of Energy of 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 14, 2004