



Department of Energy

Idaho Operations Office
1955 Fremont Avenue
Idaho Falls, ID 83415

September 2, 2010

Josh Berman
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606

SUBJECT: FOIA Response (10-034) (ID-2010-01859-F)(OHA Case No. TFA-0404) (OM-PA-10-062)

Dear Mr. Berman:

This is a revised final response from the Idaho Operations Office (DOE-ID), regarding your July 22, 2010, Freedom of Information Act (FOIA) request. In that letter you requested:

- Richard Boardman Emails
- Wood/Grubick Emails FY 2006
- Wood/Grubick Emails FY 2007
- Wood/Grubick Emails FY 2008
- Wood/Grubick Emails FY 2009

DOE has located the above documents that are responsive to your request. However, the information sought in your request, specifically, the e-mails and attachments thereto, is not subject to the Freedom of Information Act because these documents are not government records. The documents requested were not generated or controlled by DOE, and do not qualify as an agency record, for the reasons explained below.

Under the four relevant factors that DOE must consider when determining whether the agency has control over a document, DOE determined that these emails and attachments are not government records, for the following reasons:

1. The intent of the record's creator to retain or relinquish control over the record: BEA maintains the emails and attachments, and has indicated no intent to relinquish control of the documents to DOE;
2. The ability of the agency to use and dispose of the record as it sees fit: The emails and attachments are not submitted to DOE under any contractual or other requirement; DOE has not received copies of the documents, and as such, has no ability to use or dispose of them as it sees fit;
3. The extent to which agency personnel have read or relied upon the record: Again, DOE has not received copies of the emails or attachments, nor has it read or relied upon them for any purpose;

4. The extent to which the record was integrated into the agency's recordkeeping system or files: DOE has not placed these documents in its recordkeeping system or files.

In addition, these documents are not government records under the terms of the contract between BEA and DOE. Pursuant to the provisions of the contract between DOE and BEA, DOE Contract No. DE-AC07-05ID14517, and, specifically Clause I.15 of the contract, (DEAR § 970.5204-3 "Access To And Ownership of Records"), "records relating to any procurement action by the contractor," are designated as contractor-owned records, except for records that under 48 CFR 970.5232-3, Accounts, Records, and Inspection, are described as property of the Government. The emails and attachments are documents that BEA maintains as part of its subcontractor procurement system, and they are not considered government records under the contract.

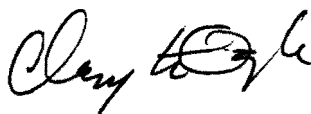
Applying the provisions of the contract between DOE and BEA to this FOIA request, DOE has determined that the requested Boardman and Wood/Grubick E-mails are the property of BEA, not the DOE. Further, the DOE has not specified that CRADA-related documents are government records under DEAR § 970.5232-3 ("Accounts, Records, and Inspections"). The emails and attachments were generated or maintained by BEA, and were under BEA's control and possession at the time of the FOIA request. The documents have not been transmitted to DOE, and remain in the control and possession of BEA. Accordingly, the Boardman and Wood/Grubick E-mails and attachments thereto are not subject to release under the FOIA.

I am the authorizing official for purposes of determining to withhold information. You may appeal, pursuant to 10 C.F.R. § 1004.8, the denial of information by the DOE. The appeal must be made within 30 calendar days of receipt of a letter denying any portion of the request. The appeal should be sent to the Director, Office of Hearings and Appeals, HG-1, U.S. L'Enfant Plaza Building, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615.

The written appeal, including the envelope, must clearly indicate that a Freedom of Information Act Appeal is being made. The appeal must contain all the elements required by 10 C.F.R. 1004.8. to the extent applicable. Judicial review will thereafter be available to you: (1) in the District of Columbia; (2) in the district where you reside; (3) in the district where your principal place of business is located; or (4) in the district where the DOE records are located. If you appeal, Please provide me a copy of the same.

I appreciate the opportunity to assist you with this matter. If you have any questions about this correspondence, please contact me at 208-526-5190.

Sincerely,



FOIA Officer

ID DISTRIBUTION:

DOE-ID Administrative Support Center
C. Ogilvie
B. Bugger
M. McKnight

CONCURRENCE:

PA BB
OCC JMM

RECORD NOTES:

1. This letter addresses a FOIA remanded to DOE-ID for further consideration.
2. This letter was drafted and reviewed by B. Bugger and M. McKnight.
3. This letter/memo closes Pegasus number N/A
4. The attached correspondence has no relation to the Naval Nuclear Propulsion Program.
5. The attached correspondence has no relation to the ARRA stimulus funding.