

FOIA/PA REQUEST

Case No.: 2011-0003A
Date Rec'd: 1-5-11
Specialist: Dennis
Related Case: 2011-0007

JOURNALIST RUSSELL CAROLLO

THRU: 1947 Newton Road Extension
Red Creek Ranch, Pueblo, CO 81005

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Fax: Call first
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Dec. 30, 2010

FOIA/PA Officer
NRC

This is an appeal under the Freedom of Information Act, 5 U.S.C. 552. On Oct. 14, 2010, I filed the attached request.

I authorize Robert S. Hart, the attorney for BailoutSleuth.com Foundation, to represent me for any further appeals/court actions.

Nothing in this appeal is intended to change the scope of the request.

The response was not correct for the following reasons:

1)The response claims NRC cannot produce a copy of the E2 travel database "in the format requested."

My request stated:

"I can accept this computer data in a variety of formats (Access, Excel, FoxPro and Paradox and many others), and I ask that you contact me first if you have any technical questions so we can work those out beforehand."

Clearly no format was specified, and I received no communication regarding available formats.

The format was never an issue. NRC previously provided records in an acceptable format; the problem was NRC did not release all requested fields or offer exemptions for denied fields.

2)On Oct. 14, 2010, I spoke with Ray Mcinterney, chief FOIA officer for the Department Of Interior's Office of the Secretary. Mr. Mcinterney said he had a number of meetings on my requests with NBC, and he determined that individual agencies, not NBC, are responsible for their releasing data.

He said: "They're definitely the client agencies' (records)...They are the records of our client agencies."

3)Please note the fact that an outside entity maintains the records does not mean the records are no longer an "agency record." These are records of how taxpayer funds were spent by employees in your agency, and the public interest is intense. In addition, taxpayer funds were used to create and maintain the records. They are agency records. They are public records. Nothing under FOIA allows agencies to deny agency records simply by sending them to an outside entity. The outside entity has your records and is paid by taxpayer funds. You have the authority to command your contractor to produce the records.

Please note that that subsection 5 USC 552(f)(2)(B) was added in the 2007 amendments, and defines "agency" records as:

" (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management. "

I am attaching DOJ guidance regarding Subsection 5 USC 552(f)(2)(B), which, again, clearly defines as "agency records" ones held by private contractors.

I spoke to counsel for the Senate Judiciary Committee, which oversaw the legislation, and I spoke to the DOJ attorney who forwarded me the guidance.

It's quite clear that Subsection 5 USC 552(f)(2)(B), sponsored by Senate Judiciary Committee Chairman Sen. Patrick Leahy, was intended to cover precisely the type of records I've requested.

In addition, item four of the Customer Responsibilities section of your contract with NBC states that NRC will "retain ownership and control of financial data contained in the accounting system."

4) Note that the Office of Government Information Services (OGIS) is working with numerous agencies to resolve issues related to my requests. The OGIS point of contact is attorney Corinna Zarek (301) 837-3788. OGIS has advised me that its involvement in no way affects an agency's administrative process.

5) The response did not address my request for a record layout (data dictionary).

I respectfully ask that you consider that this request and appeal are made by a journalist and that the information I seek is sought under a law intended by Congress to keep our citizens informed about the activities of government – a law our government and many others feel is vital to a free nation. I also respectfully ask that you consider that this response is not in keeping with the spirit or the letter of that law or with your own policies.

In any case, I expect to receive your decision no later than by 20 business days, as the statute requires.

Thank you for your assistance.

Yours very truly,


Russell Carollo



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

DEC 22 2010

Mr. Russell Carollo
1947 Newton Road Extension
Red Creek Ranch
Pueblo, CO 81005

IN RESPONSE REFER TO
FOIA/PA-2011-0007

Dear Mr. Carollo:

At this time the Nuclear Regulatory Commission (NRC) is unable to process your October 14, 2010 FOIA request for "access and copies to all databases containing information related in any way to travel by NRC employees."

In response to your request dated February 4, 2010 for similar records, the NRC put forth every reasonable effort to provide you with copies of all requested records in the format you requested. However, the NRC cannot reasonably or readily reproduce a copy of the E2 travel database in the format requested.

This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001. Clearly state on the envelope and in the letter that is a "FOIA/PA Appeal."

Sincerely,


Donna L. Sealing
FOIA/Privacy Act Officer
Office of Information Services

JOURNALIST RUSSELL CAROLLO

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Oct. 14, 2010

Donna Sealing
Nuclear Regulatory Commission

Pursuant to the federal Freedom of Information Act, 5 U.S.C. 552, I request access to and copies of all databases containing information related in any way to travel by NRC employees and/or financed by the NRC. This would include, but not be limited to, travel paid for by other entities, public or private.

This request includes, but is not limited to, all records of NRC travel held by the Department of Interior's National Business Center.

Please note that subsection 5 USC 552(f)(2)(B) was added in the 2007 amendments:

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

In an effort to minimize the response effort and taking into account the history of the response to my previous, similar request of Feb. 4, 2010, (which this request supercedes), I limit this request to fields identified in the attached record layout of the NBC database provided by BBG (identical copies also provided by RRB and CNS) -- if, and only if, these field names still are accurate. If not accurate, I ask for all requested in paragraph one of this request.

In addition, if my field selections do not include the following, I also request: any and all fields containing information related in any way to: First, middle and last names of travelers; suffixes related to names; exact dates of departure and return (month day and year); purpose(s) and type(s) of trip; destination city, state/country and all related fields (abbreviations and fields indicating foreign travel); fields identifying trips by voucher number or document number; total cost of trip and/or amount(s) paid to the traveler; fields indicating class of air travel.

I also request that you include a record layout (data dictionary) describing all database fields, including fields not specifically requested above and any training/instructional material associated with this database. I need raw computer data in an electronic form with field delimiters, **not a text dump, printout or directions to a website**. Also, please include definitions for any codes.

I can accept this computer data in a variety of formats (Access, Excel, FoxPro and Paradox and many others), and I ask that you contact me first if you have any technical questions so we can work those out beforehand.

Please justify each deletion (including individual computer fields) separately by reference to specific exemptions of the Act, and release all reasonably segregable portions of otherwise exempt material. I, of course, reserve the right to appeal any decisions.

I will only modify this request in writing -- not via telephone.

Send me documentation of any similar requests.

Notify me prior to incurring more than \$150 of expenses. The information is intended for publication that, as the fee waiver requires, is "likely to contribute significantly to public understanding of the operations or activities of the government." A number of projects about government operations written by me were published by numerous newspapers across the United States and in other countries. Those projects resulted in network news magazine shows on ABC, NBC, CBS and cable networks; Congressional hearings; federal legislation; policy changes; and numerous national awards, including three presented personally by U.S. Presidents Ford, Clinton and George W. Bush. I ask that you waive all fees.

This information is of timely value, so please communicate questions by telephone rather than by mail. I look forward to your reply within 20 business days, as the statute requires.

Thanks for your assistance.

Yours very truly,

Russell Carollo, journalist

SOURCE OF THIS DOCUMENT:

<http://www.justice.gov/oip/foiapost/agencyrecords.htm>

Treatment of Agency Records Maintained For an Agency By a Government Contractor for Purposes of Records Management

INTRODUCTION

Section 9 of the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, amended subsection (f)(2) of the Freedom of Information Act (FOIA), which contains the definition of the term “record.” Section 9 provides that agency records “maintained for an agency by an entity under Government contract, for the purposes of records management,” remain subject to the FOIA. This statutory provision clarifies existing law and was not intended to disturb settled case law defining the term “agency record.” Instead, the straight-forward purpose of the new provision was to make clear that agency records remain subject to the FOIA even if they have been placed in the physical possession of a government contractor for purposes of records management.

THE AMENDED DEFINITION OF “RECORD”

Since 1996 the FOIA has defined the term “record” as including “any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format.” 5 U.S.C. § 552(f)(2). Agencies have long applied the two-part test established by the Supreme Court in United States Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989), when determining whether a record is an agency record subject to the FOIA.

Under Tax Analysts, an agency first “must ‘either create or obtain’ the requested materials” and second, “the agency must be in control of the requested materials at the time the FOIA request is made.” Id. The Supreme Court elaborated that “[b]y control [it meant] that the materials have come into the agency’s possession in the legitimate conduct of its official duties.” Id. at 145. The Court of Appeals for the District of Columbia Circuit has found that “control” over a record maintained by a government contractor is the key consideration in the agency record analysis. See Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding that data tapes not “currently located on agency property,” are nonetheless

“agency records” due to “the extensive supervision and control exercised by the agency” over the documents). In determining whether an agency has “control” of a document, the D.C. Circuit has identified the following four factors as relevant to the analysis: “(1) the intent of the document’s creator to retain or relinquish control over the records; (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 document; and (4) the degree to which the document was integrated into the agency’s record system or files.” *Id.* (quoting D.C. Circuit opinion in Tax Analysts v. Dep’t of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (citation omitted), aff’d on other grounds, 492 U.S. 136 (1989)).

With passage of Section 9 of the OPEN Government Act, Congress retained its previous definition of the term “record,” and added a new provision specifically addressing the status of any agency records that might be in the possession of government contractors for the purposes of records management. As amended, subsection (f)(2) of the FOIA now defines a “record” to include:

- (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and
- (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management. (text added via OPEN Government Act italicized).*

The first part of Section 9 (the new paragraph “B” in the definition) delimits the reach of this new provision. By referring to “any information described under subparagraph A,” Congress made clear that the new provision pertains to records that fit within the pre-existing definition of the term “agency records” under the FOIA. In making that initial determination, agencies should continue to utilize the test set out by the Supreme Court in Tax Analysts.

The second part of Section 9 provides that when such agency records are “maintained *for an agency by an entity under Government contract, for the purposes of records management*” those records remain “agency records” subject to the FOIA (emphasis added). This provision thus addresses the distinct situation where an agency relinquishes possession of its agency records to a contractor for the purposes of records management. In such situations those records remain subject to the FOIA, just as if possession had not been transferred. In other words, when records have merely been removed to the possession of a

government contractor for the purposes of records management, those agency records remain subject to the FOIA even though they are no longer in the physical custody of the agency.

The legislative history of the OPEN Government Act reflects this straight-forward purpose behind the new provision. Senator Leahy explained that Section 9 “clarifies that FOIA applies to agency records that are held by outside private contractors, no matter where those records are located.” 153 Cong. Rec. S15831 (daily ed. Dec. 18, 2007) (statement of Sen. Leahy); see also, 153 Cong. Rec. S14849 (daily ed. Dec. 6, 2007) (same); 153 Cong. Rec. S10987 (daily ed. Aug. 3, 2007) (same). Similarly, Senator Leahy described the intent behind an earlier version of the provision this way: “This section clarifies that agency records kept by private contractors licensed by the government to undertake recordkeeping functions remain subject to FOIA just as if those records were maintained by the relevant government agency.” S. Rep. No. 110-59, at 7 (2007).

Thus, both the clear language of the new statutory provision, as well as its legislative history, make clear that this provision is intended to ensure that in the event an agency gives up possession of its agency records by transferring them to a contractor for purposes of records management, those records remain subject to the FOIA. Such a situation could occur when, for example, an agency contracts with an entity to store, organize, or manage its records.