



## Department of Energy

Office of Science  
Chicago Office  
9800 South Cass Avenue  
Argonne, Illinois 60439

**MAR 31 2010**

Mr. Paul M. Glick  
10 South LaSalle St., Ste.1017  
Chicago, IL 60603

Dear Mr. Glick:

**SUBJECT: U.S. DEPARTMENT OF ENERGY (DOE) FREEDOM OF INFORMATION ACT (FOIA) REQUEST NO. #CH-2010-01089-F**

I am the authorizing official responsible for making the determination required by Section 1004.5(b) of DOE regulations found at 10 CFR Part 1004, implementing the FOIA, 5 U.S.C. 552. This letter is in final response to your subject FOIA request.

In your original request, you were seeking a "list of criteria utilized in evaluating proposals and the scoring of same in Project ID 21286ORE (Electropolich Cavities), Key Code 7XFJJ3, Recovery Solicitation Number 4102009-2RE."

In response to your request, be advised that we have conducted a search of our office and the Fermi Site Office and have located no responsive records. We also requested that Fermi Research Alliance, LLC (FRA), the DOE contractor that operates Fermi National Accelerator Laboratory (FNAL), conduct a search for responsive records. FRA responded stating that the records they located are contractor-owned, not agency-owned records.

Be advised that only agency records maintained by the federal government are subject to FOIA. "Agency records" have been defined as documents which are either generated or acquired by an agency, and are under agency control at the time of FOIA request submission. See *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Under Contract Number DE-AC02-07CH11359 between DOE and FRA for the management and operation of FNAL, specifically Clause I.91(b)(3) (enclosed), records related to any procurement action by FRA for FNAL are specifically set out as contractor-owned records, subject to limited exceptions inapplicable to the records you are requesting. Any such records that are in FNAL's possession and not in the possession and control of DOE at the time of a FOIA request submission are not Government property, i.e., agency records subject to the FOIA. Only the records that are the property of the Government are subject to public availability. See *H&J*



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*Tool & Die Co.*, 27 DOE ¶ 80,255 (2000); 10 C.F.R. 1004.3(e)(1). Accordingly, DOE has no agency records responsive to your request.

You are advised of your right to appeal the adequacy of our search for your requested information within 30 days of receipt of this letter by writing to the Director, Office of Hearings and Appeals, United States Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. Both the request and envelope should be clearly marked "Freedom of Information Appeal." Judicial review will be available thereafter in the district in which your concern is located or has its principal place of business, where the records are located, or in the District of Columbia.

You have been categorized as an "Other" requester, and as such, you are subject to fee assessment for search time and duplication costs. However, because fees associated with this request are not substantial enough to meet the \$15.00 minimum threshold under FOIA, we are not assessing fees for this request.

If you have any questions regarding this response, please contact me at (630) 252-2041 or via e-mail at [miriam.legan@ch.doe.gov](mailto:miriam.legan@ch.doe.gov).

Sincerely,



Miriam R. Legan  
FOIA Officer

Enclosure:  
As Stated

cc: W. Begner, FSO

mechanism resulting from the process described in the clause of this contract, entitled, "Application of DOE Contractor Requirements Documents".

- (c) Except as otherwise directed by the Contracting Officer, the contractor shall procure all necessary permits or licenses required for the performance of work under this contract.
- (d) Regardless of the performer of the work, the contractor is responsible for compliance with the requirements of this clause. The contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

**CLAUSE I.91 - DEAR 970.5204-3 ACCESS TO AND OWNERSHIP OF RECORDS  
(JUL 2005)**

- (a) Government-owned records. Except as provided in paragraph (b) of this clause, 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.
- (b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
  - (1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except for those records described by the contract as being maintained in Privacy Act systems of records.
  - (2) Confidential contractor financial information, and correspondence between the contractor and other segments of the contractor located away from the DOE facility (i.e., the contractor's corporate headquarters);
  - (3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232-3, Accounts, Records, and Inspection, 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; and
- (5) The following categories of records maintained pursuant to the technology transfer clause of this contract:
  - (i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.
  - (ii) The contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.
  - (iii) Patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.
- (c) Contract completion or termination. In the event of completion or termination of this contract, copies of any of the contractor-owned records identified in paragraph (b) of this clause, upon the request of the Government, shall be delivered to DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.
- (d) Inspection, copying, and audit of records. All records acquired or generated by the contractor under this contract in the possession of the contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the contracting officer, the contractor shall deliver such records to a location specified by the contracting officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.
- (e) Applicability. Paragraphs (b), (c), and (d) of this clause apply to all records without regard to the date or origination of such records.

- (f) Records retention standards. Special records retention standards, described at DOE Order 200.1, Information Management Program (version in effect on effective date of contract), are applicable for the classes of records described therein, whether or not the records are owned by the Government or the contractor. In addition, the contractor shall retain individual radiation exposure records generated in the performance of work under this contract until DOE authorizes disposal. The Government may waive application of these record retention schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies and delivery of records described in paragraphs (a) and (b) of this clause.
- (g) Subcontracts. The contractor shall include the requirements of this clause in all subcontracts that are of a cost-reimbursement type if any of the following factors is present:
  - (1) The value of the subcontract is greater than \$2 million (unless specifically waived by the contracting officer);
  - (2) The contracting officer determines that the subcontract is, or involves, a critical task related to the contract; or
  - (3) The subcontract includes 48 CFR 970.5223-1, Integration of Environment, Safety, and Health into Work Planning and Execution, or similar clause.

**CLAUSE I.92 - DEAR 970.5208-1 PRINTING (DEC 2000)**

- (a) To the extent that duplicating or printing services may be required in the performance of this contract, the Contractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.
- (b) The term "Printing" includes the following processes: composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.
- (c) Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.
- (d) The Contractor shall include the substance of this clause in all subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations).