

EO-3003



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

May 25, 2018

Damon Tvaryanas
Richard Grubb Associates
Headquarters 259 Prospect Plains Road
Building D
Cranbury, NJ 08512

Re: AB 167 (Sub-No. 1189X), Consolidated Rail Corporation – Abandonment Exemption –
in Hudson County, NJ; Request for Records Search

Dear Mr. Tvaryanas:

You may be aware that Charles Montange has sought, under the Freedom of Information Act (FOIA), written communications between Richard Grubb Associates (RGA) and Consolidated Rail Corporation (Conrail). Attached for your information is a letter from the Board dated May 18, 2018, denying Mr. Montange's FOIA appeal but informing him that I would be taking certain action in the matter. Pursuant to section III(C)(2) of our Memorandum of Understanding (MOU), I write to request that RGA provide copies of its written communications, if any, with Conrail since July 28, 2015,¹ related to the Section 106 review in the above-referenced proceeding. Please provide the copies of these communications to me electronically at Vicki.Rutson@stb.gov on or before June 18, 2018. If you have any questions or cannot comply by the requested date, please contact me as soon as possible.

Thank you in advance for your prompt attention to this matter.

Sincerely,

Victoria Rutson
Director

Enclosure

Cc: Charles H. Montange
Chris Oehrle, STB FOIA Officer

¹ The date the MOU was executed and RGA became OEA's third-party consultant.



Surface Transportation Board
Washington, D.C. 20423-0001

May 18, 2018

Mr. Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177

Re: FOIA Request No. 18-009

Dear Mr. Montange:

This letter is in response to your Freedom of information Act (FOIA) appeal dated April 24, 2018, seeking communications between the Board's independent third-party contractor, RGA, Inc. (RGA), and Consolidated Rail Corporation (Conrail) related to Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., Docket No. AB 167 (Sub-No. 1189X).

As the FOIA Officer explained in his January 26, 2018 letter denying your FOIA request, FOIA only applies to “agency records.” To be an agency record, the agency must (1) have created or obtained the record and (2) have control over it at the time the FOIA request is made. U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). The FOIA Officer determined that the Board neither created nor obtained communications solely between RGA and Conrail under the first prong of the test, and that the Board does not “control” the requested communications within the meaning of the second prong of the test.

You argue that the cases cited by the FOIA Officer are distinguishable, and that, given the history of this proceeding, the Board should “obtain all RGA-Conrail communications still retained by RGA” and release them. (App. 5, 7.) Specifically, you argue that Burka v. U.S. Department of Health and Human Services, 87 F.3d 508 (D.C. Cir. 1996), supports disclosure of RGA’s communications with Conrail, stating that it affirms that agencies can constructively create and control records generated by consultants. (App. 5-6.) The facts in Burka differ from the facts here, however. In that case, the court concluded that the extensive supervision and control by the agency over the contractor indicated that the contractor acted on behalf of the agency in creating the materials at issue. 87 F.3d at 515. Looking at four factors relevant to the question of control,¹ the court found that the agency had constructive control of the materials because the agency, among other things, ordered the creation of the materials,

¹ Those factors are: (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. See Burka, 87 F.3d at 515.

planned to take physical possession at the conclusion of its project, and read and relied significantly on the materials in writing articles and developing agency policies. Id.

Here, the Board's Office of Environmental Analysis (OEA) has never used, reviewed, or relied upon the communications (if any) you seek to obtain through your FIOA request and appeal. Rather, the Memorandum of Understanding (MOU) and related Statements of Work, which set out the roles and responsibilities of RGA, Conrail, and OEA in the Section 106 process, requires RGA to provide certain substantive materials (such as technical data, studies, historic property valuations, field reports, etc.) to OEA for use in OEA's historic preservation review. See, e.g., MOU at 6-8. Any communications that may have occurred solely between RGA and Conrail, therefore, are not intended to be part of that historic preservation review process.

While OEA has the right under the MOU to request copies of written communications between RGA and Conrail, see MOU at 6, that right of access does not render the communications "agency records" subject to FOIA. Nor has OEA to date exercised that right and therefore has not received, reviewed, or relied upon such communications in any way. As such, the FOIA Officer correctly determined that the Board did not create or obtain, and does not control, the requested communications. See Rocky Mountain Wild, Inc. v. U.S. Forest Service, 878 F.3d 1258, 1260 (10th Cir. 2018) (holding that, notwithstanding agency's right of access to documents, documents in possession of contractor that were never shared with the agency were not created, obtained, or controlled by the agency); see also Judicial Watch, Inc. v. Federal Housing Finance Agency, 646 F.3d 924, 927-28 (D.C. Cir. 2011). Therefore, your FOIA appeal seeking communications between Conrail and RGA is denied.

Given the unique history and circumstances of this proceeding, the Director of OEA, Victoria Rutson, will request from RGA copies of its communications with Conrail since July 28, 2015,² related to the Section 106 review in Docket No. AB 167 (Sub-No. 1189X). After any such communication records from RGA are received and reviewed to determine whether any FOIA exemptions may apply, Board staff will promptly contact you.

You have the right to appeal my FOIA determination, within six years from the date of this determination, by filing a suit in a Federal district court in any of the following places: (1) where you reside, (2) where you have your principal place of business (if any), or (3) in the District of Columbia.

Sincerely,


Ann Begeman
Chairman

cc: Victoria Rutson, Director, OEA
Chris Oehrle, STB FOIA Officer

² RGA signed the MOU and became OEA's third-party consultant on July 28, 2015.