

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Kevin Leary)
)
Filing Date: January 3, 2012)
) Case No.: FIA-12-0001
)
_____)

Issued: January 27, 2012

Decision and Order

On January 3, 2012, Kevin Leary (“Appellant”) filed an Appeal from a determination issued by the Department of Energy (DOE) Richland Operations Office (RO). In that determination, RO responded to a request for information that the Appellant 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. This Appeal, if granted, would require RO to perform an additional search and either release any newly discovered responsive documents or issue a new determination justifying the withholding of any portions of those documents.

I. Background

On October 31, 2011, Appellant submitted a FOIA request to RO, for copies of e-mails, the associated metadata¹, and instant messages for Margot Voogd, Larry Romine and Bryan Foley, from August 1, 2005, through January 31, 2009. *See* Letter from Kevin Leary (October 31, 2011) (FOIA Request). RO informed Appellant that no documents existed. On November 18, 2011, Appellant specified that his request included any e-mails sent or received by the above-named individuals during the stated timeframe that were deleted and stored on DOE’s server or back-up tapes. *See* E-mail from Dorothy Riehle, Freedom of Information Officer, RO, to Avery R. Webster, Attorney-Examiner, OHA (January 5, 2012) (January 5 E-mail).

RO conducted a search of its records but did not locate responsive documents. *See* Determination Letter. In its response, RO informed Appellant that its e-mail server maintains

¹ “Metadata” includes address fields, file types, file creation and modification dates, and the author of such modifications. *See* Letter from Dorothy Riehle, FOIA Officer, RO, to Kevin Leary (August 23, 2011) (Determination Letter).

records for up to 24 days² unless there is pending litigation or some other investigative reason (such as human resources, cyber security, or counterintelligence) to keep the records. *Id.*

On January 3, 2012, the Office of Hearings and Appeals (OHA) received Appellant's Appeal in which he questions the validity of RO's response, and requests an additional search for the information that he requested. *See* Letter from Kevin Leary to OHA (Appeal Letter).

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Todd J. Lemire*, Case No. VFA-0760 (2002).³

During the processing of this Appeal, OHA contacted RO to ascertain the scope of its search for responsive documents. *See* E-mail from Avery R. Webster, Attorney-Examiner, OHA, to Dorothy Riehle, Freedom of Information Officer, RO (January 4, 2012). In its response, RO explained that a search was conducted using the names that the Appellant provided and no deleted e-mails or instant messages were found. *See* January 5 E-mail. RO informed us that its Chief Information Officer (CIO), the subject matter expert, confirmed that no e-mails relating to the named individuals were maintained for litigation or other purposes. *Id.* According to the CIO, unless saved, the e-mails are no longer retrievable from the e-mail server after 14 days from the date that they were created. *See* January 25 E-mail.

Based on the foregoing, we find that RO performed a search reasonably calculated to reveal documents responsive to the FOIA Request. Accordingly, the search was adequate under the FOIA and, therefore, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Kevin Leary on January 3, 2012, OHA Case No. FIA-12-0001, 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

² The "24-day" period is a typographical error and should actually reflect as 14 days. *See* E-mail from Dorothy Riehle, Freedom of Information Officer, RO, to Avery R. Webster, Attorney-Examiner, OHA (January 25, 2012) (January 25 E-mail).

³ All OHA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: January 27, 2012