

**United States Department of Energy  
Office of Hearings and Appeals**

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In the Matter of: Competitive Enterprise Institute	)	
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Filing Date: March 29, 2012	)	
	)	Case No.: FIA-12-0017
	)	

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Issued: April 16, 2012

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**Decision and Order**

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On March 29, 2012, the Competitive Enterprise Institute (the Appellant) filed an Appeal from two final determinations, one issued by the Department of Energy’s (DOE) Office of Energy Efficiency and Renewable Energy (EE) on March 26, 2012, and the other issued by the DOE’s Office of Congressional and Intergovernmental Affairs (CI) on March 15, 2012. In these determinations, EE and CI responded to a Request for Information 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. EE released a substantial amount of responsive information, but withheld responsive information under FOIA Exemptions 4 and 6. CI indicated that it had conducted a search for responsive documents, but had not found any responsive information. This Appeal, if granted, would require EE to release that information it has withheld to the Appellant, and would require CI to conduct a new search for responsive documents.

**I. BACKGROUND**

The Appellant filed a broad request for information with DOE Headquarters seeking all correspondence between a number of individuals and organizations and EE and CI.<sup>1</sup>

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<sup>1</sup> Specifically, the request sought all “Correspondence and any memoranda, analysis, other communications cited therein or attached, which were created, received and/or held by DOE's Office of Congressional & Intergovernmental Affairs, or Office of Energy Efficiency and Renewable Energy, which were sent to or from any of the following: 1) the office(s) of Congressman Fortney "Pete" Stark; 2) the company Solyndra; 3) any of the following individuals, all of whom are identified in public records as being paid

DOE Headquarters referred the request to EE and CI. On March 15, 2012, CI issued a determination letter (the CI Determination Letter) in which it indicated that it had not located any documents that were responsive to the Appellant's request. On March 26, 2012, EE issued a partial determination letter (the EE Determination Letter) in which it released several documents to the Appellant. However, EE withheld portions of these documents under Exemptions 4 and 6. EE Determination Letter at 1-2.<sup>2</sup> On March 29, 2012, the Appellant filed the present appeal contending EE had improperly withheld information under Exemption 6, and that CI had not conducted a reasonable search for responsive documents.

## II. ANALYSIS

### Exemption 6

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). An agency seeking to withhold information under an exemption to the FOIA has the burden of proving that the information falls under the claimed exemption. *Lewis v. IRS*, 823 F.2d 375, 378 (9<sup>th</sup> Cir. 1987). Only Exemption 6 is at issue in the present case.<sup>3</sup>

The information withheld by EE under Exemption 6 consists solely of an e-mail message authored by an EE official to a member of the public, with the subject heading: "Dinner." EE informed us that the author of this e-mail does not object to its release. April 9, 2012,

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representatives of and advocates for Solyndra before the federal government: i) Catherine Ransom; ii) Alex Mistri; iii) Gregg Rothschild; iv) Joe Pasetti; v) Victoria Sanville; vi) Andy Quinn; vii) Steve Ham; viii) Chris Fish; ix) Kyle Winslow; x) Steve McBee; xi) Angela Becker-Dippmann; 4) any individuals whose email addresses reflect affiliation with the entities cited below, all of whom are identified in public records as being paid representatives of and advocates for Solyndra before the federal government: i) Glover Park Group; ii) McAllister & Quinn; iii) McBee Strategic Consulting." Request at 1-2.

<sup>2</sup> The EE Determination Letter indicated that it is currently reviewing a number of other documents that it had identified as responsive to the Appellant's request. EE Determination Letter at 1. The present appeal concerns only those documents released to the Appellant in EE's March 26, 2012, Determination Letter.

<sup>3</sup> EE withheld portions of a patent application under Exemption 4 in its March 26, 2012, Determination Letter. The present appeal does not contest EE's withholdings under Exemption 4.

E-mail from Patrick Shipp, Office of Project Management and Evaluation, Office of Energy Efficiency and Renewable Energy to Steven L. Fine, Office of Hearings and Appeals. Accordingly, EE told us it would release the information it withheld under Exemption 6 to the Appellant in the near future. *Id.* Therefore that portion of the present Appeal concerning EE's withholdings under Exemption 6 is now moot and will be dismissed.

### **Adequacy of the Search**

In responding to a request for information filed under the Freedom of Information Act (FOIA), 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 the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

We contacted CI to gain additional information to evaluate the adequacy of its search. CI informed us that it conducted an extensive search for documents responsive to the Appellant's request. April 4, 2012, Letter from James Secreto, Office of Intergovernmental and Congressional Affairs to Steven L. Fine, Office of Hearings and Appeals at 1-3 (Secreto Letter). This search included two electronic searches of DOE's Headquarters E-mail database. *Id.* In addition, CI required each employee to conduct self-searches of both their e-mail and written correspondence records for responsive documents. *Id.*

The Appellant correctly notes that EE found a number of responsive documents while CI found none. The Appellant contends that CI is more likely than EE to have received responsive correspondence, and therefore CI's search is deficient on its face. CI however, has provided the following explanation:

CI did not produce this correspondence because CI believed [EE] conducted a search of DOE's Office of the Executive Secretariat's Electronic Document Online Correspondence and Concurrence System and produced the responsive documents identified in those search results. Therefore, an additional search of the Electronic Document Online Correspondence and Concurrence System is unlikely to identify additional responsive documents that have not already been provided to [the Appellant] with [EE's] March 26, 2012 letter and production.

Secreto Letter at 3. EE informed this Office that it had included DOE's Office of the Executive Secretariat's Electronic Document Online Correspondence and Concurrence System in its search for responsive documents. April 10, 2012, E-mail from Patrick Shipp, Office of Energy Efficiency and Renewable Energy, to Steven L. Fine, Office of Hearings and Appeals.

After reviewing the search for responsive documents conducted by EE in response to the Appellant's initial request, we find that it was reasonably calculated to uncover any responsive documents and was therefore adequate.

### **III. CONCLUSION**

Since EE stated that it will release that information it withheld under Exemption 6, we are dismissing that portion of the Appeal. Because we have found that CI's search for responsive documents was adequate, we require no further action by CI on that portion of the Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by the Competitive Enterprise Institute, Case No. FIA-12-0017, is hereby dismissed in part and denied in all other aspects.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review 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: April 16, 2012