

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Daniel W. McKeel, Jr.)
)
Filing Date: December 2, 2013) Case No.: FIA-13-0075
)
)
_____)

Issued: December 13, 2013

Decision and Order

On December 2, 2013, Daniel W. McKeel, Jr., (Appellant) filed an Appeal from a determination issued to him on October 22, 2013, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (Request No. FOIA 13-00189-K). In that determination, NNSA stated that it had no documents responsive to the request 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 challenges the adequacy of NNSA’s search and, if granted, would require NNSA to conduct another search for responsive documents.

I. Background

On June 10, 2013, the Appellant filed a request with the NNSA for:

any and all documents—purchase orders, thorium alloy plate shipping manifests, source shipment manifests, memoranda on installing mg-thorium alloy plates in railroad cars and semi-trucks, correspondence between Dow Madison (IL) and Rocky Flats (CO) sites concerning the subject of interest in this FOIA, and pertinent technical reports, log books, weighing records, etc.—related to shipments by truck or rail, in the 1951-2000 time frame, of magnesium-thorium alloy metal plates, possibly HK31A, from Dow Madison, Illinois, Atomic Weapons Employer (AWE) [Energy Employees Occupational Illness Compensation Program Act (EEOICPA)] site to the Rocky Flats (DOE) EEOICPA site in Golden, Colorado.

Request E-Mail dated June 10, 2013, from Appellant to FOI Officer, NNSA. In response to the request, NNSA stated that no responsive records were found after a search of approximately 127 boxes of paper records. Determination Letter dated October 22, 2013, from Elizabeth L. Osheim, Deputy General Counsel, NNSA to Appellant. On December 2, 2013, the Appellant filed this Appeal asking that responsive documents be provided to him. He is basing his belief

that documents exist on conversations with DOE officials and other eyewitness statements. He is also requesting that all 400 boxes transferred from Rocky Flats to NNSA be searched. Appeal Letter dated November 22, 2013, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

Adequacy of the Search

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.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). “[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., *Project on Government Oversight*, Case No. TFA-0489 (2011).^{1/}

We contacted NNSA to determine what type of search was conducted in response to the request. We were informed that NNSA contacted the Los Alamos National Laboratory (LANL) regarding the search. LANL conducted a search of the 127 page index, listing the contents of the 900 boxes received from Rocky Flats.^{2/} The keywords used were HK31A, HM21A, magnesium-thorium, strikes, semi-truck, rail cars, rail, transport MOD Center, Building 440, and shipment. LANL did not search the 900 boxes by hand. It also searched the classified database. The search was performed by six different individuals with specialized knowledge and access to the Rocky Flats records. E-Mail dated December 10, 2013, from Karen Laney, NNSA, to Janet R. H. Fishman, OHA. No responsive records were found.

Given the above information, we find that NNSA’s search for the responsive information was adequate. LANL asked those most knowledgeable about the subject area to search the 127 page index of the 900 boxes transferred from Rocky Flats. NNSA asked the office with possession of the documents to conduct a search, and no responsive information was located. As stated above, the standard for agency search procedures is reasonableness, which “does not require absolute exhaustion of the files.” *Miller*, 779 F.2d at 1384-85. We will therefore deny the Appellant’s Appeal.

^{1/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha>.

^{2/} In its determination, NNSA stated that it searched 127 boxes of records transferred from Rocky Flats. Determination Letter at 1. Previously, NNSA had stated to the Appellant that 400 boxes had been transferred from Rocky Flats. E-mail from Karen Laney, NNSA, to Appellant (Exhibit E13 to Appeal Letter). In an email from NNSA to OHA, NNSA increased the number of boxes transferred from Rocky Flats to NNSA from 400 to 900. There was a 127-page index outlining the boxes contents. This index was searched in response to the Appellant’s request.

III. Conclusion

After considering the Appellant's arguments, we are convinced that NNSA conducted a search reasonably calculated to uncover the requested document. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Daniel W. McKeel, Jr., Case No. FIA-13-0075, is hereby denied.
- (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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 23, 2013