

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

In the Matter of Alan Butler )  
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Filing Date: October 6, 2015 ) Case No.: FIA-15-0056  
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Issued: November 24, 2015

**Decision and Order**

On October 6, 2015, Alan Butler filed an Appeal from a determination issued to him by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2014-01555-F). In that determination, OIR responded to a request for information that Mr. Butler 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 OIR to conduct an additional search for responsive documents.

**I. Background**

On August 4, 2014, OIR received a FOIA request from Mr. Butler seeking “(1) Any policies, regulations, white papers, final memoranda, guidelines, or training materials interpreting or addressing the collection, retention, dissemination, or sharing of electronic communications or metadata under EO [Executive Order] 12333” and “(2) The most recent version of IC member agency procedures adopted under EO 12333, including DOD 5240 1-R, Army Regulation 381-10, and USSID-18.” Request at 4. OIR assigned the request to the Office of Intelligence and Counterintelligence (IN) to conduct a search. Letter from Alexander Morris, OIR, to Mr. Butler (August 7, 2014) at 1. On September 25, 2015, OIR issued a determination stating that “IN has completed its search, but did not locate any documents responsive to your request.” Determination Letter from Alexander Morris, OIR, to Mr. Butler (September 25, 2015) at 1.

On appeal, the Appellant contends that the DOE should have documents responsive to his request. First, he argues that EO 12333 requires that intelligence community (IC) agencies implement guidelines “that must be approved by the AG [Attorney General].” Appeal at 1. Because DOE is a member of the IC and because IN provides scientific and technical expertise to the IC, it should have responsive documents. Specifically, he asserts that the 1992 version of the DOE’s procedures under EO 12333 has been released to the public and, at the very least, that document, or its successor, should have been identified as responsive.

Mr. Butler also contends that responsive documents should exist on the basis of the Presidential Policy Directive (PPD) 28. He asserts that various provisions of PPD 28 required the DOE, as a member of the IC, to produce information about its policies and procedures “for safeguarding personal information collected from signals intelligence activities.” Appeal at 2.

## 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.” *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., *Ralph Sletager*, Case No. FIA-14-0030 (2014).\*

Given the very specific nature of Mr. Butler’s request, we find that OIR was correct to direct the request to IN for a search of its records. When we contacted IN regarding its search for responsive records, IN provided the following explanation. The only responsive document it has is its own procedures that implement the requirements of EO 12333. The current version of those procedures were adopted in 1992, and has been released to the public, as Mr. Butler stated in his appeal. No updated version of those procedures exists. Moreover, IN does not possess other documents, such as training materials, that interpret or address EO 12333’s requirements or guidelines. Finally, IN does not possess any responsive material produced by other IC member agencies. Memorandum of Conversation between IN and William Schwartz, Office of Hearings and Appeals (October 20, 2015).

To address Mr. Butler’s contention that PPD 28 required the DOE to produce information that would be responsive to his request, we asked IN to review any materials it might have produced for that purpose. IN informed us that it did not produce any responsive materials with respect to PPD 28. E-mail from IN to William Schwartz (November 19, 2015).

The courts in *Truitt* and *Miller* require that an agency responding to a FOIA request conduct a search reasonably calculated to uncover all relevant documents. Based on the foregoing information, we find that no additional search is necessary. While IN should have identified the 1992 procedures as responsive to Mr. Butler’s request, we do not conclude that IN’s failure to identify the existence of a public document, of which Mr. Butler was already aware, reflects any inadequacy in its search for responsive documents. We find that IN’s search for documents responsive to Mr. Butler’s August 4, 2014, request was adequate and that no other responsive documents exist.

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\* OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/office-hearings-and-appeals>.

It Is Therefore Ordered That:

- (1) The Appeal filed on August 18, 2015, by Alan Butler, Case No. FIA-15-0056, 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.

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