

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine exemptions are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden to show that withheld information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Adequacy of 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." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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).¹

We spoke with NETL regarding how it conducted the search for the Appellant's FOIA requests. NETL informed us that it is familiar with the Appellant because he is a former employee of NETL and he has submitted several separate FOIA requests, some of which are still pending. To process the request, NETL identified the individuals who were most likely to locate responsive records, contacted those individuals, and requested that they conduct a search of their records. Email chain between OHA and NETL (November 13, 2017) (Email Chain II). Those individuals searched their physical and electronic records, including Outlook emails, using relevant search terms such as "Manivannan," "investigation," "Management Directed Inquiry," and "final SF-50." *Id.* Additionally, the FOIA Officer at NETL conducted electronic and hard copy file searches using the Appellant's name and the names of other individuals relevant to the particular request. Email chain between OHA and NETL (November 2, 2017) (Email Chain I). The FOIA Officer also searched the eDiscovery (or Sharepoint) database, which allows access to all NETL personnel email. Email Chain II. Subsequently, the FOIA Officer reviewed the results of the above searches to identify information responsive to the Appellant's requests. *Id.* After concluding its review, NETL determined that it had searched all locations where responsive records may reside. *Id.*

The Appellant challenged the adequacy of NETL's search for all eleven requests. For requests #3-11, we are satisfied that NETL did a search reasonably calculated to locate all responsive documents. NETL reasonably interpreted the Appellant's requests and used its interpretation to conduct searches using the process described above. Using the Appellant's name, along with other relevant search terms from the requests, is reasonably likely to produce any records in their electronic or hardcopy files. While NETL's search did not produce documents in each instance, this result is not surprising given the wording of some

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

requests, which in some instances asked for the “justification document[s]” for why certain actions were or were not allegedly taken. *See, e.g.*, Requests 5 and 7.

The sufficiency of NETL’s search in response to requests #3-11 is exemplified by its search for documents responsive to request #4. Request #4 sought “all the records on the step by step government procedures followed by NETL on [the Appellant’s] internal investigation. . .” Determination Letter at 1. In its Determination Letter, NETL stated that it failed to locate “a document that states a step by step government procedure followed for conducting internal investigations.” *Id.* NETL further informed us that it began its search by consulting with the NETL subject-matter expert attorney who worked on the investigation, and the attorney confirmed that there are no written procedures with regard to the Appellant’s investigation. Email Chain II. Next, the NETL FOIA Officer searched eDiscovery to sift through all emails and attachments that contained the investigator’s name. *Id.* Then, the FOIA Officer searched the DOE Directives site on DOE’s home page, which contains all DOE Orders and Directives, using the terms “investigation,” “Management Directed Inquiry,” “procedures and investigation,” and “personnel investigations.” *Id.*

NETL’s search in response to request #8 provides another example. Request #8 sought information related to “claims made by [the investigator]” regarding text communications made to a NETL intern “using the [Appellant’s] DOE . . . phone.” Determination Letter at 2. The Appellant further provided examples of documents he wanted, such as “the certification from the provider” and time and date records matching the text messages to the phone. *Id.* NETL interpreted the request “as seeking all the phone and text messages along with proof or evidence that calls were made from the texts sent from a government phone.” Email Chain I. NETL stated that this is the same information used to make the final determination in the MDI. *See id.* NETL then manually searched the MDI and reviewed the exhibits, which were the Appellant’s government phone records for the relevant period. Email Chain II. During its search, NETL failed to locate any “certified authorization.” Email Chain I. NETL also ensured that there were no other possible sources of responsive records by consulting with its subject-matter expert on the subject. *Id.* NETL then released, with redactions, all of the text messages with times and dates contained in the MDI. The above two examples demonstrate that NETL appropriately interpreted the request language, consulted with a subject-matter expert, and then used relevant search terms to conduct a search of locations where responsive records would likely be located.²

Turning to requests #1 and 2, however, NETL has not demonstrated that it conducted an adequate search for either request. Request #1 sought “information on the names of all the NETL personnel who initiated and were involved with [the Appellant’s] investigation.” Appeal at 1. In response, NETL conducted a search for the names of those responsible for both requesting and making a determination that the investigation be conducted. Email Chain I. Avoiding the question of what “information on the names” of NETL personnel encompasses, as opposed to merely the names, NETL’s interpretation of the request does not include all NETL personnel who either initiated the investigation or were involved with the investigation. In other words, NETL’s interpretation is too narrow, given the agency’s charge to interpret

² Furthermore, NETL was not required to conduct a search in the instance of request #5. That request sought “information on the justification records for not providing the internal investigation report prepared in January 2016 . . . to [the Appellant’s] lawyer . . .” Appeal at 2. However, NETL stated that the internal investigation was in fact delivered to the Appellant’s attorney. This fact precluded the need for NETL to search for the “justification record.” *See Michael Best, Case No. FIA-16-0059 (2016)* (finding that a search was unnecessary when a person familiar with the records maintained by the agency determines that no responsive records were, in fact, maintained).

FOIA requests liberally. *Bill Streifer*, Case No. FIA-16-0029 (2016) (quoting *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)).

Similarly, request #2 sought, in part, “information on all the NETL correspondence with [the investigator]. . . .” Determination Letter at 1. In the Determination Letter, NETL stated that it previously provided documentation regarding the hiring of the investigator and the requisition. *Id.* However, NETL informed us that, based on its interpretation of the request, there may also be additional email communications between NETL and the investigator that were neither searched for nor provided to the Appellant. Telephone Memorandum between NETL and OHA (November 2, 2017). In other words, it does not appear that NETL conducted a search of its email databases or other locations for any records that contained “correspondence” between NETL and the investigator. Therefore, we cannot conclude that NETL conducted a reasonable search in response to request #2.

Based on the foregoing, we conclude that NETL conducted an adequate search in response to requests #3-11, but NETL did not conduct an adequate search in response to requests #1 and 2. Therefore, we will remand the Appeal on requests #1 and 2 for NETL to conduct a new search and issue another determination letter.

B. FOIA Exemptions

After conducting the above search and locating responsive documents, NETL withheld portions of documents from release pursuant to Exemptions 5 and 6. The first question we must consider is whether NETL’s determination letter is sufficient to enable us to conduct a review. Determination letters must fulfill certain requirements to allow the requester to decide whether the agency’s response to its request was adequate and proper and to provide this office with a record upon which to base its consideration of an administrative appeal. *See, e.g., The Oregonian*, Case No. VFA-0467 (1999). One such requirement is that determination letters must provide requesters with an explanation of why material was withheld. Thus, a determination letter must “specifically indicate which exemptions . . . are being applied to each withholding.” *Id.* The determination letter must also adequately justify the withholding of information by explaining briefly how the claimed exemption applies to the withheld document. *See, e.g., State of New York*, Case No. TFA-0269 (2008); 10 C.F.R. § 1004.7(b)(1) (responses denying a request for a record must include “a brief explanation of how the exemption applies to the record withheld”).

In this case, the Determination Letter does not identify or explain how the claimed exemptions apply to the redacted information contained in NETL’s responses to requests #8-11. For instance, to justify withholding information it located in response to requests #9-11, NETL cited to Exemption 5 and stated that “certain information has been redacted pursuant to exemption (b)(5) of the FOIA.” Near the end of the letter, NETL also stated that the information implicates the attorney work-product and attorney client privileges. *Id.* Standing alone, these statements do not provide any explanation or justification regarding how Exemption 5 applies to the documents NETL withheld. In cases where we determine that an office did not provide an adequate determination in response to a FOIA request, we generally remand the request with instructions to issue a new determination. *See, e.g., Great Lakes Wind Truth*, Case No. FIA-14-0066 (2014); *Idaho Conservation League*, Case No. FIA-12-0040 (2012). Accordingly, we will remand this matter to NETL to issue a new determination so that it can identify and explain its justification for withholding information under Exemptions 5 and 6.

III. Conclusion

For the reasons stated above, we conclude that NETL conducted an adequate search for all of the Appellant's requests, with the exception of requests #1 and 2. We also find that NETL's Determination Letter does not appropriately explain or justify its use of Exemptions 5 and 6 to redact or withhold information in response to requests #8-11. We will therefore grant the present Appeal in part and refer the matter to NETL for further processing to (1) conduct a further search related to the Appellant's requests #1 and 2 and (2) provide additional explanation or justification for redacting or withholding information related to requests #8-11. We will deny the Appeal in all other respects.

IV. Order

It is hereby ordered that the Appeal filed on October 30, 2017, by Ayyakkannu Manivannan, Case No. FIA-17-0038, is granted in part.

This matter is hereby referred to the Department of Energy's National Energy Technology Laboratory, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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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