

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

In the Matter of Greg Marlowe)		
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Filing Date: January 3, 2018)	Case No.:	FIA-18-0002
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Issued: January 12, 2018

Decision and Order

On January 3, 2018, Greg Marlowe (Appellant) appealed a determination issued by the Department of Energy’s (DOE) Office of Public Information (OPI) on September 26, 2017 (Request No. HQ-2017-01762-F). In that determination, the OPI responded to a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appellant challenges the decision by the OPI to transfer the request to the U.S. Patent and Trademark Office (PTO). As explained below, we have interpreted the Appeal as a challenge to the adequacy of OPI’s search for responsive records. We have further determined that the Appeal should be granted.

I. Background

The Appellant filed a FOIA request for eight “record of invention forms” associated with eight patent applications filed by Willard F. Libby during the 1940s. Request from Appellant to the DOE (August 14, 2017) at 1-2. In its determination, OPI found that “[a]ny responsive documents that may exist are under the jurisdiction of the Department of Commerce United States Patent and Trademark Office.” Determination Letter from Alexander C. Morris, OPI (September 26, 2017) at 1. OPI therefore transferred the request to the PTO. *Id.*

The Appellant filed an Appeal challenging OPI’s finding that the request falls under the PTO’s jurisdiction. *See* Appeal from Appellant to OHA (December 22, 2017) at 1, 5. In support, he asserts that the requested records involve classified nuclear weapons technologies and that a declassification review is necessary. *See id.* at 2. He contends that a transfer of his request to the PTO was inappropriate because, unlike the DOE, the PTO does not have the authority to review the classified status of the records. *Id.* Instead of transferring the request, he asserts, the DOE should find or obtain the records and ask its Office of Classification to conduct a review. *Id.* at 5.

II. Analysis

We recently considered an appeal involving an identical request by another researcher. *See Robert J. Thompson*, OHA Case No. FIA-17-0040 (2017) (*Thompson*).¹ In *Thompson*, OPI transferred the request to the PTO, as it has done here. *Id.* at 1. The Appellant filed an appeal, objecting to the transfer. *Id.* In reviewing that appeal, we contacted OPI and learned that no responsive records had been located, following a search in two locations: (1) the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62); and (2) the Office of Environment, Health, Safety and Security. *Id.* at 2; Memorandum of Conversation between Gregory Krauss, OHA, and OPI (November 3, 2017) (OPI Memo) at 1. We therefore interpreted the appeal as a challenge to the adequacy of OPI's search. *Thompson* at 2; OPI Memo at 1. Likewise, we will interpret this Appeal as a challenge to the adequacy of OPI's search for responsive records.

When processing the appeal in *Thompson*, we consulted with GC-62. GC-62 informed us that the requested records may exist and may be in the DOE's possession. *Thompson* at 3; Email from Robert T. Burns, GC-62, to Gregory Krauss, OHA (November 30, 2017). We therefore remanded the matter to OPI to allow an opportunity for a new search.² *Thompson* at 3. In this matter, we reach the same result as in *Thompson*. Accordingly, we will remand this request to OPI so that it may conduct an additional search and issue a revised determination based on the results of the search.

III. Order

It is hereby ordered that the Appeal filed on January 3, 2018, by Greg Marlowe, Case No. FIA-18-0002, is granted.

This matter is hereby remanded to the Department of Energy's Office of Public Information, 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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¹ Decisions issued by OHA are available on the OHA web site located at <http://www.energy.gov/oha>.

² OPI has informed us that it is continuing to process the request filed by the Appellant in *Thompson*. Email from OPI to Gregory Krauss, OHA (January 9, 2018).

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