

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

In the Matter of Robert J. Thompson)		
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Filing Date: October 16, 2018)	Case No.:	FIA-18-0035
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Issued: November 26, 2018

Decision and Order

On October 16, 2018, Robert J. Thompson (“Appellant”) appealed a determination issued by the Department of Energy’s (DOE) Office of Public Information (OPI) on July 18, 2018 (Request No. HQ-2017-00828-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 adequacy of the DOE’s search for responsive records and its decision to withhold information under Exemption 3 of the FOIA. This Decision and Order reviews only the search that was conducted for responsive records.

I. Background

The Appellant filed a FOIA request for eight “invention record sheets” associated with eight patent applications filed by Willard F. Libby. Request from Appellant to DOE (March 9, 2017) (“Request”) at 1. The patent applications regarded scientific work done by Dr. Libby during the Manhattan Project. *Id.* The Appellant specified that the documents should be labeled “record of invention” in the top line. *Id.* In his request, the Appellant provided serial numbers and other information associated with each patent application. *Id.* at 3.

In an earlier determination issued on September 26, 2017, OPI transferred the request to the U.S. Patent and Trademark (USPTO) office. *See* Determination Letter from Alexander C. Morris, FOIA Officer, OPI (September 26, 2017) at 1. OPI explained in its determination that any responsive records would be under the USPTO’s jurisdiction. *Id.* After the Appellant appealed that determination to this office, the Office of Hearings and Appeals (OHA), the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property (“GC-62”) informed us that it might have responsive records in its possession. *See Robert J. Thompson*, OHA Case No. FIA-17-0040 (2017). We therefore remanded the request to OPI so that GC-62 could conduct a search for the requested records. *Id.*

On remand, OPI organized a new search for responsive records. In the determination in the present case, issued on July 18, 2018, OPI stated that the request had been referred for a search to GC-62

as well as to the Office of Environment, Health, Safety and Security (“AU”). Determination Letter from Alexander C. Morris, FOIA Officer, OPI (July 18, 2018) at 1. Six of the invention disclosure forms were located but two of the records were not found. *Id.* OPI released two of those six documents in full. The other four documents contained information that the Office of Classification determined was classified under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296. *Id.* at 2. OPI’s letter stated that the Office of Classification had determined that this information should be withheld pursuant to Exemption 3 of the FOIA. *Id.*

In his Appeal, the Appellant challenges the Office of Classification’s withholdings under Exemption 3. Letter from Appellant to OHA (October 15, 2018) (“Appeal”) at 1. The Appellant also argues that the DOE should have taken additional steps to locate the two forms (“Record of Invention Forms” or “invention disclosure forms”) that were not found. He states that he has obtained information showing that the USPTO has copies of the same Record of Invention forms. *Id.* at 2. He argues that the DOE should have acquired the two missing forms from the USPTO, performed a declassification review, and released those two documents to him. *See id.* The Appellant also contends that the DOE should have obtained the other six forms from the USPTO and compared them with the forms it did locate in order to verify that the documents it released to him are not missing any information. *Id.*

We have bifurcated this appeal and will address the Appellant’s challenge to the Exemption 3 withholdings in another case, Case No. FIC-18-0001. In the instant case, we will review only the adequacy of the DOE’s search for responsive records.¹

II. Analysis

The FOIA requires that a search be reasonable, not exhaustive. “[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 v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). In cases such as these, “[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government’s search for responsive documents was adequate.” *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1981) (emphasis in original). We have not hesitated to remand a case where it is evident that the search conducted was, in fact, inadequate. *See, e.g., Ralph E. Sletager*, OHA Case No. FIA-14-0030 (2014).

A. Searches in GC-62 and AU

Following our remand in December 2017, OPI sent the request to GC-62. Memorandum of Telephone Conversation between OHA and OPI (October 17, 2018). GC-62 informed us that it conducted a search for the records in its vault, where patent-related records are stored. Email from

¹ The Appellant devotes much of his Appeal to arguing that the DOE did not properly process his previous FOIA requests. *See* Appeal at 1-5. After we sent the Appellant an acknowledgement letter stating that we would review the adequacy of the DOE’s search, the Appellant replied in an email, stating “at root I did NOT appeal the adequacy of . . . OPI’s search for responsive records.” Email from Appellant to Gregory Krauss (October 18, 2018). He argues that the focus of his appeal was the DOE’s performance in responding to his FOIA requests. *Id.* However, given that the Appellant clearly expressed that the DOE should have obtained the two documents it did not locate, we will construe the Appellant’s appeal as challenging the adequacy of the search. If we did not review the search, OHA would be required to dismiss this portion of the Appeal due to a lack of jurisdiction over the other matters raised by the Appellant. *See* 10 C.F.R. § 1004.8(a) (defining OHA’s jurisdiction to process FOIA appeals).

Brian Lally, GC-62, to Gregory Krauss, OHA (October 24, 2018) (“Lally Email”). The files in the vault are searchable using IPManager, a database containing intellectual property information that is searchable by nearly 50 different fields, including the inventor’s name and the serial number of the patent application. *Id.*; Email from Brian Lally, GC-62, to Gregory Krauss, OHA (November 14, 2018). In response to earlier FOIA requests, GC-62 had found 13 patent records listing Dr. Libby as an inventor. Lally Email. Because of these previous FOIA requests, GC-62 had set aside the eight files corresponding to the eight relevant patent applications. *Id.*

After receiving this FOIA request again, GC-62 went to the area of the vault at DOE headquarters where the files are stored. *Id.* GC-62 maintains a separate file folder associated with each patent application. *Id.* Each file contains at least 20 pages, some of which consists of correspondence from Dr. Libby. *Id.* GC-62 performed a thorough search of those eight files and found the requested records in six of the eight files. *Id.* Two of the files, corresponding to two of the patent applications, did not contain the requested invention disclosure forms. *Id.* GC-62 stated that it would not expect those two forms to be in any other files in its vault because all information about a given invention is stored in only one file. *Id.*

OPI’s determination letter of July 18, 2018, also refers to a search by AU. OPI informed us that, following our remand, it did not ask AU to perform a search. Memorandum of Telephone Conversation between OHA and OPI (October 19, 2018). However, OPI did consult with AU before OPI issued its initial determination letter on September 26, 2017. Memorandum of Telephone Conversation between OHA and OPI (November 3, 2017). When AU received the request in April 2017, it referred the request to the Office of Classification (“AU-60”). *See* Email from Scott McFadden, AU-60, to AU-60 officials (April 20, 2017). If the records had been through a previous classification or declassification process, AU-60 may have had copies. *See* Email from Michael Kolbay, AU-60, to OPI and AU officials (April 20, 2017) (“Kolbay Email”); Memorandum of Conversation between Gregory Krauss, OHA, and Michael Kolbay, AU-60 (October 31, 2018). AU-60 determined at that time that it had no record of reviewing the classified status of the invention disclosure forms, or of similar records, and that it therefore would not have the invention disclosure forms in its possession. *See* Kolbay Email. Reviewing the request again for the purposes of this appeal, AU could identify no other AU location that might have responsive records.² *See* Email from Robyne Johnston, AU, to Gregory Krauss, OHA (October 29, 2018).

B. Searches at Other DOE Locations

An agency has an obligation to search all locations likely to have responsive documents. *Bartko v. U.S. Dep’t of Justice*, 167 F. Supp. 3d 55, 64 (D.D.C. 2016). GC-62 informed us that it was unlikely that the two invention disclosure forms it did not find would be found elsewhere at DOE. *See* Lally Email. AU, however, suggested contacting DOE’s Office of History and Heritage Resources (“DOE History Office”) to verify that no other DOE location should be searched. *See* Email from Robyne Johnston, AU, to Gregory Krauss, OHA (October 29, 2018); Email from Andrew Wallo, AU, to Robyne Johnston, AU (October 26, 2018). Upon consultation by OHA, the DOE History Office suggested that OHA verify that the records would not be held by the Office of Scientific

² As noted above, the Office of Classification, or AU-60, did review the six records that GC-62 located in 2018. Accordingly, as a result of this request, AU-60 now possesses copies of those six records.

and Technical Information (OSTI)³ or by the Oak Ridge Office (ORO). Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Eric Boyle, DOE History Office (October 30, 2018). The DOE History Office stated that those locations may have intellectual property (IP) records from the relevant time period. *Id.*

We subsequently contacted OSTI, which agreed to perform a search in a database that contains metadata on its classified records holdings. Memorandum of Conversation between Gregory Krauss, OHA, and David Gottholm (November 2, 2018). OSTI searched using the two patent application serial numbers associated with the two missing invention disclosure forms as well as other information submitted by the Appellant regarding the patent applications. *Id.* The searches did not produce any indication that OSTI has responsive records in its possession. *Id.* In addition, OSTI performed similar searches in three databases containing its unclassified holdings: DOEpatents, DOE's internal E-link system ("E-link"), and OpenNet.⁴ Letter from Erin Anderson, OSTI, to Gregory Krauss, OHA (November 21, 2018) ("Anderson Letter") at 1-2. Dr. Libby's name was found in some of the search results, but none of those results was related to the two patent applications. *Id.* at 1-2. OSTI also searched its unclassified paper records, some of which have not been digitized, by searching in a database containing metadata on those paper records. *Id.* at 1; Email from Erin Anderson, OSTI, to Gregory Krauss, OHA (November 26, 2018). OSTI did not locate any responsive records. Anderson Letter at 2.

When we contacted ORO, ORO stated that there was a possibility that it possessed responsive documents and agreed to perform a search. Email from Linda Chapman, ORO, to Gregory Krauss (November 1, 2018); Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Linda Chapman, ORO (November 2, 2018). ORO, however, noted that DOE headquarters is the official repository of records of this type and that anything that ORO had would be copies. Email from Linda Chapman, ORO, to Gregory Krauss (November 2, 2018). An IP attorney at ORO searched in IPManager, which is apparently the same database that GC-62 used for its search at DOE headquarters. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Linda Chapman, ORO (November 8, 2018) ("November 8 Memo"); Email from Linda Chapman, ORO, to Gregory Krauss, OHA (November 13, 2018) ("Database Email"). Using the patent application serial numbers corresponding to the two missing forms, ORO retrieved database records for each of the patent applications. *See* Database Email, Attachments 1 and 2. The two database records both contain information that links each patent application with a DOE field office. *See* Database Email, Attachments 1 and 2. One of the database records, corresponding to serial number 552,913, lists Oak Ridge as the corresponding field office. Database Email at Attachment 1. The other database record, corresponding to serial number 723,465, lists Chicago as the DOE field office. Database Email at Attachment 2. ORO stated that the field office that is

³ OSTI is a DOE organization that works "to collect, preserve, and disseminate both unclassified and classified scientific and technical information emanating from DOE-funded research and development activities at DOE national laboratories and facilities and at universities and other institutions nationwide." OSTI, *About OSTI*, <https://www.osti.gov/about> (last visited November 8, 2018).

⁴ DOEpatents is a database publicly available at <https://www.osti.gov/doepatents/>. It is "a searchable database of patent information resulting from DOE-sponsored research and development." OSTI, *About DOEpatents*, <https://www.osti.gov/doepatents/about> (last visited November 23, 2018). Elink is a system that is used for submitting scientific and technical information to DOE. Letter from Erin Anderson, OSTI, to Gregory Krauss, OHA (November 21, 2018) at 2. OpenNet is another OSTI database that provides access to 495,000 bibliographic references and 147,000 recently declassified documents. *Id.* at 3.

listed in these database records may refer to a location that was involved in managing the relevant scientific research. *See* November 8 Memo.

Because only the first of these patent applications was linked to Oak Ridge in IPManager, ORO only searched for records related to that application. *See* November 8 Memo. ORO officials conducted searches in two places: its Central Library and its Records Holding Area. Email from Linda Chapman, ORO, to Gregory Krauss (November 7, 2018) (“November 7 Email”). ORO searched the Central Library by searching in the Document Accountability Tracking System (DATS), a database that would indicate the presence of records in that location. *Id.*; *Institute for Research: Middle Eastern Policy, Inc.*, OHA Case No. FIA-18-0004 (2018) (*Institute for Research*) (describing a search conducted at ORO). Search terms were based on the title of the patent application, the serial number for the patent application, and Dr. Libby’s name. November 7 Email. ORO also searched in DATS for Central Library Records by using information taken from IPManager. These search terms included: (1) an Oak Ridge case number assigned to that patent application; and (2) a contract number found in the IPManager database record; and (3) “Columbia University,” the name of the contractor listed in the database record. *Id.*; Database Email; Database Email at Attachment 1. The Central Library also was searched using a database that contains SF-135 transmittal forms, which would show the retirement of relevant records to ORO’s Records Holding Area. *See* November 7 Email. Separately, ORO looked for records in the Records Holding Area by searching in DATS, using similar search terms, and by searching in the database containing the SF-135s.⁵ *Id.*; Email from Linda Chapman, ORO, to Gregory Krauss, OHA (November 8, 2018). These searches in the Central Library and the Records Holding Area did not produce any evidence of responsive records. *See* November 7 Email.

At ORO’s suggestion, we also contacted DOE’s Chicago Office, a support center for the DOE’s Office of Science. Of the two patent applications, the only one that had been linked to Chicago was the patent application with serial number 723,465.⁶ The Chicago Office, however, searched for records associated with both patent applications. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Miriam Bartos, Chicago Office (November 8, 2018) (“Bartos Memo”). The Chicago Office conducted a manual search of boxes held in its vault and did not find anything dating to the time period of the requested records. *Id.* Because many University of Chicago records from the era of the Manhattan Project have been stored at Argonne National Laboratory (ANL), the Chicago Office also asked ANL to conduct a search. *Id.* ANL has created a database that serves as a finding aid to its historical records. *See id.* ANL performed electronic searches using variations on Dr. Libby’s name, the titles of the two patent applications, and the

⁵ In *Institute for Research*, we described a search of four locations in ORO’s Records Holding Area: (1) a document management system; (2) DATS; (3) a classified database; (4) an Excel database. *Institute for Research* at 2. ORO informed us that the two databases searched by the Records Holding Area are the first and second items referenced in *Institute for Research*. The Records Holding Area did not search the third location, the classified database, because that database is temporarily inaccessible. Email from Linda Chapman, ORO, to Gregory Krauss, OHA (November 8, 2018). ORO did not separately search in the Excel database because the information in that database has been added to the first of these four databases. *Id.* That database was searched and is the same database that contains the S-135s. *Id.*

⁶ As described above, the IPManager database identifies Chicago as the field office for this patent application. It is also notable that the patent application was filed in 1947. Request at 3; Database Email at Attachment 2. Another reason to search at DOE locations in the Chicago area is that in the late 1940s, Dr. Libby worked at the University of Chicago, which had received a contract to operate Argonne National Laboratory. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Miriam Bartos, Chicago Office (November 8, 2018).

serial numbers. Email from Miriam Bartos, Chicago Office, to Gregory Krauss, OHA (November 8, 2018). ANL was unable to locate any records related to those two patent applications. *Id.*

C. Appellant's Arguments

As a final matter, the Appellant argues that the USPTO holds the requested records and that the DOE has an obligation to obtain those records from the USPTO on his behalf. This argument is unavailing. Even assuming that USPTO is in possession of the records,⁷ there is no requirement, under the FOIA, for agencies to arrange a search at other agencies where responsive documents may be stored. The FOIA pertains only to those documents in an agency's possession at the time of a request. *John Qualls*, OHA Case No. FIA-14-0021 (2014); *Coal. on Political Assassinations v. DOD*, 12 F. App'x 13, 14 (D.C. Cir. 2001) (finding that the agency conducted an adequate search even though potentially responsive records may have been transferred to the National Archives and Records Administration); *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) (“[A]n agency need not obtain or regain possession of a record in order to satisfy a FOIA request.”). Although OPI could have transferred the request to the USPTO as a courtesy, as it did at an earlier stage in processing this matter, OPI did not have an obligation to determine whether the USPTO might have the records or to obtain the records from the USPTO.

To be sure, when an agency finds records in its possession that originated with another agency or that another agency is best able to review, the agency may refer the requested record to that other agency for a response. *See* Department of Justice, “OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them,” (2011); 10 C.F.R. § 1004.4(f)(1) (describing DOE's referral procedures when a document originated in another agency); 37 C.F.R. § 102.5(b) (describing circumstances in which the USPTO would refer a FOIA request to another agency or consult with another agency). In this case, however, the records were not located at the DOE. If the Appellant were to file this request with the USPTO, and if the USPTO were to find responsive records, the USPTO would need to determine how to respond and what referrals or consultations, if any, would be appropriate.

D. Conclusion

Based on the foregoing, we find that GC-62 conducted a search reasonably calculated to uncover the records sought by the Appellant. Moreover, taking into account the additional searches conducted on appeal, we are unable to identify any other DOE location likely to have the two invention disclosure forms that GC-62 was unable to locate. We therefore find that the search that the DOE conducted was adequate and deny the present appeal.

III. Order

It is hereby ordered that the Appeal filed on October 16, 2018, by Robert J. Thompson, Case No. FIA-18-0035, is denied.

⁷ The Appellant states in his Appeal that a DOE official who communicated with the USPTO revealed, in a 2013 email to another FOIA requester, that the USPTO possessed its own copies of the Record of Invention forms. *See* Appeal at 2. GC-62, however, informed us that it is unlikely that the USPTO has copies of the forms because those forms would not have been part of the patent applications. *See* Lally Email. We did not seek to ascertain whether the USPTO has copies of the requested records.

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 the right to pursue litigation. OGIS may be contacted 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: www.archives.gov/ogis
Email: ogis@nara.gov
Telephone: 202-741-5770
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