

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

In the Matter of: Cause of Action Institute )  
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Filing Date: January 9, 2019 ) Case No.: FIA-19-0001  
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Issued: January 16, 2019

**Decision and Order**

On January 9, 2019, Cause of Action Institute (Appellant or the Institute) appealed a Determination Letter issued to it from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2019-00123F. In that determination, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. The DOE conducted a search and found no documents responsive to the request. The Appellant challenged the adequacy of the DOE’s search. In this Decision, we deny the Appeal.

**I. BACKGROUND**

On October 29, 2018, the Institute sent a FOIA request to the DOE requesting:

1. All records reflecting Department of Energy procedures, policies, guidelines, or instructions concerning the proper interpretation and implementation of the “foreseeable harm” standard, 5 U.S.C. 552(a)(8)(A)(i)(I), both generally and with respect to each statutory exemption.
2. All communications between the DOE and (a) the Department of Justice Office of Information Policy (OIP), (b) the Executive Office of the President (including, but not limited to, the Office of the White House Counsel), and/or (c) Congress (including, but not limited to, Members, Committees, or congressional staff) regarding the “foreseeable harm” standard, its interpretation, and/or its implementation.

FOIA Request No. HQ-2019-00123-F at 2 (Oct. 29, 2018). The request covered the time period from June 30, 2016, to November 8, 2018, and was assigned to the DOE’s Office of the General Counsel and to OPI. *Id.* The “foreseeable harm” standard allows agencies to withhold information under a FOIA exemption only if (1) “the agency reasonably foresees that disclosure would harm an interest protected by” the FOIA exemption described, or (2) “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A). This standard, signed into law in the FOIA Improvement Act of 2016,

was a codification of a policy established in 2009 by the then Attorney General, which stated that the Department of Justice would only defend an agency's denial of a FOIA request if it met the "foreseeable harm" standard. U.S. Dep't of Justice, *Guide to the Freedom of Information Act 25* (2009 ed.), [https://www.justice.gov/archive/oip/foia\\_guide09/procedural-requirements.pdf](https://www.justice.gov/archive/oip/foia_guide09/procedural-requirements.pdf).

OPI conducted a search of all email communication with OIP during the relevant period and found no responsive records. Memorandum of Telephone Conversation between Alexander Morris, OPI, and Kristin L. Martin, Office of Hearings and Appeals (OHA) (January 11, 2019). OPI searched (1) all emails ending in @usdoj.gov; (2) keyword "FOIA exemptions"; and (3) keyword "Exemption 5". Signed MA46 Search Certification (December 17, 2018) (MA46 Search Certification). Additionally, General Counsel personnel confirmed that they had received no communications regarding the "foreseeable harm" policy during the specified time period and that they had no internal policies for such. Memorandum of Telephone Conversation between Todd Burns, GC-56, and Kristin L. Martin, OHA (January 11, 2019) (Burns Memorandum). *See also* Signed GC56 Search Certification (November 14, 2018). No responsive records were located by these searches.

OPI issued a Determination Letter to the Appellant on December 21, 2018, stating that it had found no records responsive to the Institute's request. The Institute filed its Appeal with the OHA on January 9, 2019, alleging that the searches must have been inadequate because "[c]onsidering the import of the FOIA Improvement Act of 2016, ... DOE—by and through its Office of Public Information—should have developed and published guidance about the foreseeable harm standard for its disclosure officers." Appeal at 2 (Jan. 9, 2019). OPI confirmed to the OHA that the last FOIA guidance it received long predated June 30, 2016. Morris Memorandum. It confirmed that Congress had not communicated with DOE regarding "foreseeable harm" relevant to the request. *Id.* OPI further stated that it has been using language about "foreseeable harm" in its determination letters for several years. *Id.*

## II. ANALYSIS

The FOIA requires agencies to make publicly available records that are reasonably described in a written request, so long as those records are not exempt from disclosure. *Kidder v. F.B.I.*, 517 F. Supp. 2d 17, 236 (D.D.C. 2007); 5 U.S.C. §§ 552(a)(3)(A), (b). Requesters may appeal the adequacy of the search an agency made in satisfying the request. In these appeals, the factual question raised is "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *SafeCard Servs., Inc. v. Sec. and Exch. Comm'n*, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1201 (1991). *See also Hillier v. Cent. Intelligence Agency*, No. 16-cv-1836 (DLF), 2018 U.S. Dist. LEXIS 155414, at \*18 (D.D.C. Sept. 12, 2018) (citing *SafeCard* with approval). In responding to a FOIA request, an agency need not conduct an exhaustive search of each of its record systems; rather, it need only conduct a reasonable search of "all systems 'that are likely to turn up the information requested.'" *Ryan v. FBI*, 113 F. Supp. 3d 356, 362 (D.D.C. 2015) (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The standard of reasonableness depends on the facts of each case. *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 497 (D.D.C. 2017) (citing *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). A lack of responsive records does not necessarily indicate that a search was unreasonable. Indeed, if a "[c]ourt is satisfied with the method of search,

it need not dwell on the sheer results.” *Conti v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 42544, at \*37 (S.D.N.Y. Mar. 24, 2014).

The DOE’s searches pursuant to the Institute’s request were designed to cast a wide net, targeting all Department of Justice communications and general categories such as “FOIA Exemptions.” The DOE’s FOIA review attorneys confirmed that they had not received any communications from the Executive Office of the President or Congress regarding “foreseeable harm” during the specified time period. OPI’s FOIA Officer personally reviewed each email he received from the Department of Justice during the specified time period. This level of care and detail, as well as the broad scope of the search, was reasonably calculated to discover records relevant to the request.

The Appellant argues that “DOE—by and through its Office of Public Information—should have developed and published guidance about the foreseeable harm standard for its disclosure officers” due to “the import of the FOIA Improvement Act of 2016.” Appeal at 2. However, the fact that no responsive documents were located is unsurprising given the time period specified in the request and the advent of the “foreseeable harm” standard. The standard was first issued in 2009 and, therefore, a lack of responsive documents after June 30, 2016, is not strong evidence of an inadequate search. Weighing this against the evidence of a reasonable search, I find that the search was adequate.

### **III. ORDER**

It is hereby ordered that the Appeal filed on January 9, 2019, by the Cause of Action Institute, No. FIA-19-0001, is denied.

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 one’s 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: <https://www.archives.gov/ogis> Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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