

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Martin Pfeiffer)
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Filing Date: March 4, 2019) Case No.: FIA-19-0005
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_____)

Issued: March 13, 2019

Decision and Order

On March 4, 2019, Mr. Martin Pfeiffer (Appellant) appealed a Determination Letter issued by the United States Department of Energy’s (DOE) National Nuclear Security Administration (NNSA) regarding Request No. FOIA 19-00054-EW. In that letter, the NNSA responded to Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which he sought photographs of Plutonium Tetrafluoride (PuF₄). The NNSA indicated that its search produced only one record responsive to Appellant’s request; a photo provided to him in response to an earlier FOIA request. Appellant asserts that the NNSA’s search was not reasonably calculated to identify all of the photographs responsive to his request. As explained below, we grant the appeal and remand the matter to NNSA for a further search.

I. Background

On December 5, 2018, Appellant submitted a FOIA request for “[a]t least 20 photographs of Plutonium Tetrafluoride (PuF₄) in which the pinkish/reddish color of PuF₄ (sometimes referred to as “pink cake”) is clearly visible. Please include the date and location of when such pictures were taken when available.” Appellant’s FOIA request was similar to another FOIA request Appellant submitted to the NNSA in June 2017 seeking photos of PuF₄, to which the NNSA responded by providing one (1) photograph.

On or about February 24, 2019, the NNSA issued a response to Appellant’s FOIA request in which it indicated that it was unable to locate any records besides the photograph it had previously provided to the Appellant in response to his 2017 FOIA request. Determination Letter from John E. Weckerle, Authorizing and Denying Official, NNSA, to Martin Pfeiffer (February 24, 2019) (Determination Letter). In the Determination Letter, the NNSA indicated that Triad National Security, the management and operating contractor (the M&O contractor) for Los Alamos National Laboratory (LANL), had conducted the search. *Id.* at 1.

On March 4, 2019, DOE’s Office of Hearings and Appeals (OHA) received Appellant’s appeal. Martin Pfeiffer FOIA Appeal (February 6, 2019). In his appeal, Appellant asserted that the NNSA’s search was not reasonably calculated to locate the photographs he had requested because:

(1) a chemist at LANL had told him in 2016 that multiple photos of PuF₄ existed at LANL; (2) he found it unlikely that “a world-center of plutonium research since the 1940s, would have one and only one color photograph of PuF₄;” (3) the picture he was provided did not depict the pink color he expected to observe, and therefore he deemed it likely that LANL had provided him with a mislabeled photo rather than the photos he had requested; and, (4) the NNSA’s response did not include the information he requested concerning the date and location of the photo. *Id.* at 1.

An OHA staff attorney contacted representatives of the M&O contractor, who indicated that the M&O contractor had forwarded Appellant’s 2017 FOIA request to LANL’s Actinide Material Processing & Power Division (AMPP Division). A scientist within the AMPP Division produced a photograph, which he deemed the best available photograph of the true color of PuF₄. At the scientist’s suggestion, the M&O contractor also contacted LANL’s Chemical Division, which did not identify any records responsive to Appellant’s request. The M&O Contractor contacted the scientist in the AMPP Division again after Appellant submitted his 2018 FOIA request, and the scientist reiterated that he believed that the photograph he had previously provided was the best available photograph of PuF₄.

According to the M&O contractor, the identifying number on the photograph provided to Appellant corresponds to an entry in a LANL photograph database. The scientist who identified the photograph indicated that one or more other photographs of PuF₄ likely exist, and would be stored in the photograph database, but would probably be from different stages of processing and not reflect PuF₄’s true color as well as the photograph he provided. Representatives of the M&O contractor indicated that, based on the aforementioned information provided by the scientist, they had not searched the photograph database for records responsive to Appellant’s request.

II. Analysis

A. Adequacy of NNSA’s Search

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. FBI*, 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*, 926 F.2d 1197, 1201 (1991). 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. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). A search’s adequacy “is generally determined not by the fruits of the search, but by the appropriateness of [its] methods . . .” *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). However, 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*, OHA Case No. FIA-14-0030 (2014).

In contrast to the search that was conducted, we find that it would have been reasonable for the M&O contractor to search LANL's photograph database for photographs responsive to Appellant's request, particularly in light of the fact that the photograph it did provide to Appellant was assigned an identifying number for storage in the photograph database. Further, the scientist who identified the photograph believes that other photographs of PuF₄ exist, and are most likely stored in the photograph database. Accordingly, we will remand this matter to the NNSA to conduct a search of the LANL photograph database.

III. Order

It is hereby ordered that the appeal filed by Martin Pfeiffer on March 4, 2019, No. FIA-19-0005, is granted. This matter is hereby remanded to NNSA, which shall issue a new determination in accordance with 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.

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:

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