

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

In the Matter of: Emma Best	)	
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Filing Date: March 3, 2022	)	Case No.: FIA-22-0009
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Issued: March 25, 2022

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**Decision and Order**  
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On March 3, 2022, Emma Best (Appellant) appealed a Determination Letter issued to her from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2019-01367-F. 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. OPI determined that there were no responsive documents. The Appellant challenged the adequacy of the search. In this Decision, we deny the appeal.

**I. Procedural Background**

On August 26, 2019, Appellant filed a FOIA request seeking:

Documents mentioning or describing any use of "Still Interested" letters (i.e. letters inquiring if the requester is still interested in the records requested) in the processing and/or closure of FOIA requests, including but not limited to:

- The original proposal for their use
- Materials authorizing the use of any of the letters
- Controlling policies or procedures
- Any reports or statistics tracking their use, responses received and/or impact on any FOIA backlog
- Communications with OGIS regarding "Still Interested" letters
- Communications between the FOIA offices and and general counsel's/legal services office discussing or mentioning "still interested" letters
- Materials describing or discussing the number of days given to requesters to respond
- Materials describing the agency's policy on reopening requests when a requester responds after the period of time specified in the letter

[sic]. OPI issued a determination letter stating that the search, performed on May 22, 2020, had yielded no results and, therefore, OPI had determined that no responsive records existed. Appellant appealed the adequacy of the search, challenging its integrity and arguing that DOE uses “still

interested” letters and had even used one during the course of processing her FOIA request.<sup>1</sup> OPI submitted to OHA a written response stating that DOE does not have its own policy on “still interested” letters but does follow the public guidance released by the Department of Justice (DOJ). OPI also submitted the certification of the search, which indicated that OPI’s Director had performed manual and automated searches for the terms “still interested” and “requester interest” in OPI’s staff records and emails.

## II. Statutory Background

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)). Consequently, when the adequacy of an agency’s FOIA search is appealed, the factual question raised is not whether the search discovered every existing responsive document, but whether the search was reasonably calculated to discover them. *SafeCard Servs., Inc. v. Sec. and Exch. Comm’n*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). *See also Heffernan v. Azar*, 317 F. Supp. 3d 94, 110 (D.D.C. 2018). 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 indicate that a search was unreasonable. Indeed, a search’s adequacy “is determined not by the fruits of the search, but by the appropriateness of [its] methods.” *Hodge v. FBI*, 703 F.3d 575, 579 (D.C. Cir. 2013) (citing *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)) (internal quotation marks omitted). The burden is on the agency to show that its actions were proper, 5 U.S.C. 552(a)(4)(B), and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., American Oversight*, OHA Case No. FIA-19-0010 (2019).

The personal knowledge of agency employees may limit the scope or depth of a search where such personal knowledge reasonably leads the searcher to believe that such scope and depth are reasonably calculated to discover requested records. Though an agency “cannot fail to search at all based upon alleged personal knowledge,” such personal knowledge may guide a search such that a more limited scope is reasonable.” *James Madison Project v. DOJ*, 267 F. Supp. 3d 154, 161 (D.D.C. 2017).

## III. Analysis

The OPI Director had personal knowledge that there was no DOE specific policy governing the use of “still interested” letters. It is reasonable to assume that any discussion of the topic by DOE’s Office of the General Counsel would have included the OPI Director because OPI would be the only affected office. Therefore, it is reasonable to assume that a search for a finished policy and draft or discussion documents would be discovered in a search of the OPI Director’s records and

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<sup>1</sup> Appellant timely appealed; however, due to complications with communications during the COVID-19 pandemic, the appeal was not received by OHA until March 2022. Because Appellant filed her appeal within 90 days of receiving the determination letter, I find that this appeal is timely.

emails.<sup>2</sup> Accordingly, I find that the search of OPI staff records and emails was reasonably calculated to discover responsive documents. Regarding Appellant's argument that responsive records must exist because OPI uses "still interested" letters, the mere presence of the words "still interested" do not place a record within the scope of Appellant's FOIA request. The request outlines specific types of communications, all of which are focused on policy and policy discussions, not individual "still interested" letters sent to requesters. Moreover, transmittals to staff of the DOJ guidance DOE follows would entail information available to the public and it is well-established that agencies are not required to provide public information in response to FOIA requests. *See Emma Best*, OHA Case No. FIA-19-0003 at 6 (2019) (citing *Oglesby*, 920 F.2d at 70.).

OPI has met its burden to show that its search was reasonably calculated to discover the responsive records by submitting the search certification and an explanation that DOE has no relevant policy of its own. Appellant's arguments are insufficient to overcome OPI's evidence. She has offered only a statement questioning the integrity of the search and an argument that the use of "still interested" letters means responsive records must exist. As to the first, the statement is conclusory. *See SafeCard Servs.*, 926 F.2d at 1201 ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.") As to the second, the foregoing analysis disposes of her argument. While I recognize that Appellant is at a disadvantage because she does not have access to the records she claims were not produced, she must nonetheless demonstrate that, factually speaking, the search was not reasonably calculated to discover responsive records. *See CareToLive v. FDA*, 631 F.3d 336, 341 (6th Cir. 2011). She has not done so and, accordingly, I cannot hold that OPI's search was inadequate.

#### **IV. Order**

It is hereby ordered that the Appeal filed on March 3, 2022, by Emma Best, No. FIA-22-0009, 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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<sup>2</sup> All DOE emails are archived and retained for at least seven years, regardless of deletion status in a user's personal account.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals