United Sates Department of Energy
Office of Hearings and Appeals

In the Matter of	Patrick McMullen	)	
		)	
Filing Date:	June 28, 2022	)	Case No.: FIA-22-0020
		)	
		)	

Issued: July 12, 2022

Decision and Order

On June 28, 2022, Eli Kay-Oliphant (Appellant)[1] appealed three partial determination letters (Partial Determination Letters) issued by the Department of Energy's (DOE) Office of Public Information (OPI), dated March 31, 2022, April 29, 2022, and June 1, 2022. All three letters responded to Request No. HQ-2021-00645-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The first Partial Determination Letter was accompanied by 17 pages of responsive records and the second Partial Determination Letter was accompanied by seven pages of responsive records. Portions of the aforementioned records were withheld pursuant to FOIA Exemptions 5 and 6. The third Partial Determination Letter was accompanied by 8 pages of responsive records, portions of which were withheld pursuant to Exemption 5. The Appellant challenges the decision to withhold information pursuant to Exemption 6, the adequacy of the search that was conducted, and the adequacy of the determination letters. In this Decision, we deny the appeal.

I. Background

On May 3, 2021, Appellant submitted the FOIA request to the DOE. The request asked the DOE to provide:

> All documents discussing or containing information about the rulemaking "Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment," including all documents discussing or relevant to the proposed revision of this rule published in the Federal Register on April 12, 2021 (Docket No. EERE-2021-BT-STD-0003).

Appeal Letter Email from Eli Kay-Oliphant at 2 (June 28, 2022).

[1] The initial FOIA request was made by Patrick McMullen, but was transferred to Mr. Kay-Oliphant on or about July 9, 2021. Email from Eli Kay-Oliphant to Natonne Kemp at 1 (July 9, 2021). Although the Appeal was filed by Mr. Kay-Oliphant, both individuals shall collectively be referred to as "Appellant" throughout this decision.

On May 17, 2021, the DOE FOIA Officer contacted the Appellant to clarify the scope of the FOIA request. First Partial Determination Letter from Alexander C. Morris to Eli Kay-Oliphant at 1 (March 31, 2022). Appellant agreed that the FOIA request included "[d]ocuments showing contemplated and proposed revisions to the noted rule OR 2" and "[d]ocuments related to the rule before Executive Order (EO) 13990 (January 20, 2021) was issued (this EO told DOE to reconsider the rule)." *Id.*

Appellant received the first Partial Determination Letter on March 31, 2022. *Id.* The letter was accompanied by 17 pages of responsive records. *Id.* This Partial Determination Letter explained that the request had been assigned to the DOE's Office of Energy Efficiency and Renewable Energy (EE) and the Office of the General Counsel (GC). *Id.* The Partial Determination Letter also indicated that the DOE "started its search on May 10, 2021," which was "the cut-off date for responsive records." *Id.* As indicated above, 17 pages of responsive records were attached to the letter and contained redactions made pursuant to Exemptions 5 and 6. *Id.* at 1-2.

The second Partial Determination Letter was sent to the Appellant on April 29, 2022. Second Partial Determination Letter from Alexander C. Morris to Eli Kay-Oliphant at 1 (April 29, 2022). The letter stated that the DOE had identified seven additional pages of responsive records and informed the Appellant that portions of these records had also been redacted pursuant to FOIA Exemptions 5 and 6. *Id.* at 1-3.

The DOE sent Appellant a third Partial Determination Letter on June 1, 2022. Third Partial Determination Letter from Alexander C. Morris to Eli Kay-Oliphant at 1 (June 1, 2022). This letter contained an additional eight pages of responsive documents. *Id.* at 2. In the letter, The DOE explained that redactions had been made pursuant to FOIA Exemption 5. *Id.* The DOE also noted that it was "continuing to process [Appellant's] request." *Id.* at 3.

Appellant timely appealed each of the three Partial Determination Letters. First, Appellant argues that the DOE's search for records was inadequate. Appeal at 4. In making this argument, the Appellant asserts that "a cursory review of the documents shows that the decision [to search the EE and GC offices only] was not reasonable." *Id.* To illustrate his assertion, the Appellant notes that one responsive document, an email, contained information indicating that an individual named "Sofie" had performed necessary calculations. *Id.* He also argues that "[a]nother document indicates that persons at the Office of the Under Secretary for Infrastructure and the Office of the Under Secretary for Science & Innovation were involved[,]" and accordingly, those offices should also have been searched for responsive documents.[2] *Id.* Finally, the Appellant argues that the responsive documents make reference to "program," and as a result, the DOE should have first determined to which office "program" referred, then endeavored to search the relevant office for responsive documents. *Id.* Believing that the "program" refers the Office of Federal Energy

[2] In arguing that the search was inadequate, the Appellant notes the fact that he reached out to the DOE FOIA analyst before filing the Appeal to request that a search be conducted of the aforementioned offices, in addition to the Office of Federal Energy Management Programs. *Id.* at 5. The initial and amended FOIA requests do not list these offices, and only indicate that the Appellant was searching for documents pertaining to the proposed rule. It should be noted that "[a] reasonable effort to satisfy that request does not entail an obligation to search anew based upon a subsequent clarification." *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir 1996).

Management Programs, the Appellant asks that a search be conducted of that office's records as well. *Id*. at 4.

The Appellant also asserts that the redactions made pursuant to FOIA Exemption 6 were improper. He first alleges the context of the redaction from the first Partial Determination Letter proves that the document "is not a personnel or medical file" and the release of the redacted information could not create a threat to privacy. *Id.* at 5. The Appellant went on to argue that even if the redaction was a "similar file," the DOE "has not carried its burden of showing that releasing the information would constitute a 'clearly unwarranted invasion of personal privacy'" because the DOE did not provide a sufficient explanation for why the information must be protected. *Id.* at 6. Appellant reiterates this argument in regard to each of the Exemption 6 redactions. *Id.*

II. Analysis

A. Adequacy of the Search

In responding to a request for information filed under FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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, 897 F.2d at 542. "The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Jennings v. Dep't of Justice*, 230 F. App'x 1, 1 (D.C. Cir. 2007) (internal quotation marks omitted). Whether the search conducted was reasonable depends on the facts of each case, and when it is evident that the search conducted was in fact inadequate, we have not hesitated to remand a case. *See, e.g.*, *In the Matter of Ayyakkannu Manivannan*, Case No. FIA-17-0035 (2017); *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)).

In this case, Appellant alleges that because the DOE did not perform further searches based on the responsive documents that it found in its initial searches, it failed to complete an adequate search in response to the request. Appeal at 4. The DOE need not search exhaustively, it only needs to "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57 (D.C. Cir.1990). However, an agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell v. Dep't of Justice*, 164 F.3d 20, 28 (D.D.C. 1998). As such, "the reasonableness of an agency's search [is assessed] based on what the agency knew at its conclusion rather than what the agency speculated at its inception." *Id.*

The Appellant asserts that the responsive documents referred to an individual named "Sofie" and to "Program." Appeal at 4-5. Accordingly, the Appellant asserts that "Sofie's" records should have been searched and the DOE should have determined which office "Program" is and searched that office's records. *Id.* Upon seeking further information regarding the individual named "Sofie," however, OHA learned that this person is not an employee of the DOE, and therefore, the DOE

does not have the ability or authority to search her records. Email from Whenda James to OHA at 1 (June 7, 2022). Further, the term "Program" is in fact referring to EE. Email from Whenda James to OHA at 1 (July 8, 2020). EE was searched for responsive records. *Id.* Therefore, the OPI's failure to investigate "Sofie" and "Program" did not lead to any deficiency in the search that was conducted.

The Appellant also argues that responsive documents indicated individuals from the Office of the Under Secretary for Science & Innovation and the Office of the Under Secretary for Infrastructure "were involved," and accordingly, those offices should have been searched, as well. *Id.* at 4. We find otherwise. As an initial matter, it is not readily apparent from the face of the responsive documents that the offices are likely to possess responsive documents. The offices were neither mentioned in the body of the emails, nor was it immediately and unequivocally apparent from the email addresses contained in the emails that comprised the responsive records that the offices in question were implicated. While an agency cannot "ignore what it cannot help but know," this is not "a lead so apparent that the [DOE] cannot in good faith fail to pursue it." *Kowalczyk*, 73 F.3d at 389. As stated by the court in *Kowalczyk*, "the agency need pursue only a lead it cannot in good faith ignore, *i.e.*, a lead that is both clear and certain." *Id.* Accordingly, we find no error in the fact that OPI did not search the Office of the Under Secretary for Science & Innovation and the Office of the Under Secretary for Infrastructure.

B. Exemption 6 Redactions

Exemption 6 of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As a threshold matter, to be exempt from disclosure, the record must be personnel, medical, or other similar files. *Id.* A record is a "similar file" when it "contains personal information identifiable to a particular person." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 175 (2d Cir. 2014). The Supreme Court has noted that Congress intended "the phrase 'similar files' [] to have a broad, rather than a narrow, meaning." *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982).

After it is determined that the information falls into one of those categories, the agency must determine whether the record may be withheld. The agency must first determine whether the disclosure of the record would compromise a significant privacy interest. *Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If no such privacy interest exists, then the agency may not withhold the record based on this exemption. *Id.* If the agency determines that a privacy interest does exist in the record, the agency must then decide if the release of the record would serve the interest of the public by shedding "light on an agency's performance of its statutory duties[.]" *Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989). If so, the agency must then determine whether "the potential harm to privacy interests from disclosure [would] outweigh the public interest in disclosure of the requested information[.]" *Ripskis*, 746 F.2d at 3.

Here, OPI redacted "personal information belonging to an individual" and a "personal email address." First Determination Letter at 2; Second Determination Letter at 2. The term "similar files" is meant to be construed broadly. *U.S. Dep't of State v. Wash. Post. Co.*, 456 U.S. 595, 600

(1982). As the documents "contain[] personal information identifiable to a particular person[,]" they constitute "similar files." *Cook*, 758 F.3d at 175.

Regarding the redacted email address, courts have generally found that personal email addresses are "similar files" under Exemption 6 and that the individuals who own email addresses have a privacy interest in preventing disclosure in order to avoid harassment. *Citizens for Responsibility and Ethics in Washington v. Dep't of State*, No. 19-1344, 2022 WL 1801054, at *13 (D.D.C. June 2, 2022); *see also Gov't Accountability Project v. Dep't of State*, 699 F. Supp. 2d 97, 106 (D.D.C. 2010); *Jud. Watch, Inc. v. Dep't of State*, 306 F. Supp. 3d 97, 116–17 (D.D.C. 2018). Based on the foregoing, we find that it was appropriate to redact the email address pursuant to Exemption 6.

Turning to the remainder of the redactions made pursuant to Exemption 6, an examination of the documents reveals that the redacted portions consist of casual conversation between coworkers regarding personal matters and frustrations. This information is, by its very nature, intimate and potentially embarrassing. Releasing conversations containing personal information about federal employees would be an invasion of privacy that could open employees up to harassment while providing no discernable benefit to the public. *See, e.g. SAI v. Transportation Security Admin.*, 315 F.Supp.3d 218, 262 (D.D.C. 2018) (protecting "personal information" regarding two TSA employees for which there was no public interest in disclosure). Not only is there "no discernable interest in the redacted information[,]" but "[s]uch information 'reveals little or nothing about [the] agency's own conduct[.]'" *Id.* Therefore, we find these redactions were appropriate.

C. Adequacy of the Determination Letter

While challenging the Exemption 6 redactions, the Appellant argues that the "DOE [did] not even provide a 'speculative' explanation for why the information must be protected." Appeal at 6. The Appellant also argues that the Partial Determination Letters never explained how the documents qualify as "similar files." *Id.* We construe this argument to be a challenge to the adequacy of the Partial Determination Letters. In responding to requests for records under the FOIA, agencies are required to notify requesters of the decisions reached "and the reasons therefor." 5 U.S.C. § 522(a)(6)(A)(i)(I). Additionally, determination letters must meet certain requirements to allow requesters to determine whether a response is adequate. A determination letter must: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld; and (3) specify the exceptions or exemptions under which information was withheld. *See, e.g.*, *Center for Biological Diversity*, OHA Case No. FIA-17-0053 (2017); *Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 (2014); *Tom Marks*, OHA Case No. TFA-0288 (2009).[3] Accordingly, "DOE regulations provide that denials of FOIA requests must justify the withholding of information by providing a 'brief explanation of how the exemption applies to the record withheld.'" *Center for Biological Diversity* at 4.

With regard to Exemption 6, the only exemption at issue in the Appeal, the Partial Determination Letters explain that the searches resulted in documents that contain "personal information" and a "personal email address." First Partial Determination Letter at 2; Second Partial Determination

[3] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

Letter at 2. The Partial Determination Letters also explain that the aforementioned redactions are being withheld pursuant to Exemption 6, stating that Exemption 6 "disclosure requirements of FOIA do not apply to 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'" *Id.* The Partial Determination Letters provide an explanation of what the DOE considered in withholding the redacted information, and how the information qualified as "similar files." *Id.* The letters assert that there was no public interest in disclosing the redacted information, that the release of the information "could subject the individual to unwarranted or unsolicited communications," and that there was "a viable privacy interest that would be threatened by such disclosure[.]" *Id.* at 2-3. The Appellant has not identified any deficiency in this explanation, and accordingly, we find that the provided explanation meets the requirement to provide a "brief explanation" of how Exemption 6 applies to the withheld information.

III. Order

It is hereby ordered that the Appeal filed on June 28, 2022, by Eli Kay-Oliphant, FIA-22-0020, 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. § 522(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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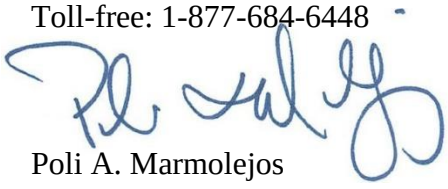

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