

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

In the Matter of Savannah River Site Watch)
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Filing Date: July 10, 2023)
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_____)

Case No.: FIA-23-0022

Issued: August 1, 2023

Decision and Order

On July 10, 2023, Savannah River Site Watch (SRS Watch or Appellant) appealed a determination letter dated June 13, 2023, issued by the Department of Energy's (DOE) Savannah River Operations Office (SRO). The letter responded to Request No. SRO-2023-00646-F, 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 determination letter noted that DOE identified three responsive documents and two with redactions to remove inapplicable classification markings and one with redactions pursuant to Exemption 3 of FOIA. The Appellant challenges the decision to withhold information on one of the documents that the agency determined has now inapplicable classification markings and the adequacy of the search for communications. In this Decision, we grant the appeal.

I. Background

On March 1, 2023, Appellant submitted a FOIA request to DOE. FOIA Request from SRS Watch at 1 (Mar. 1, 2023). The request asked for:

- Any modification to the original Work for Others (WFO) agreement between DOE/Savannah River Nuclear Solutions and Jülicher Entsorgungsgesellschaft für Nuklearanlagen (JEN) - located at the Forschungszentrum Jülich (FZJ) in Germany - and the Savannah River Site [SRS], Savannah River Nuclear Solutions [SRNS], and/or the Savannah River National Laboratory [SRNL] after February 2022. Modification Number 9 to the Work for Others agreement terminated on February 28, 2023, so this request covers any "modification" or new agreement subsequent to Modification Number 9. The requested modification(s) may be called Modification Number 10 (or higher);
- Any documentation on import of irradiated or unirradiated [sic] graphite fuel "pebbles" or materials from Germany to SRS. (At the time of this filing, it is believed that JEN obtained initial permission to export 33 fuel pebbles but it is unknown if final permission has been obtained from the Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA) - the Office of Economics and Export Control or other German agencies. The export is facing legal challenge.);

- Any attachments to Modification 10 requested above and any reports from any SRS entity that were provided to Germany in 2022 or 2023 under the Work for Others agreements; and
- Any communication, including letters and emails, between SRNL, SRS or DOE and JEN or other German entities on the status of the cooperation, including on terminating or reviving the WFO or other cooperation.

Id. at 3. The Appellant further specified that the request was for the agreement subsequent to the one that ended on February 28, 2023, and any communications about the status of the research after the agreement ending in February of 2023. *Id.* at 2.

SRO sent a letter acknowledging the request on March 2, 2023. Email from SRO to SRS Watch at 1 (Mar. 2, 2023). In order to search for responsive communications, SRO identified the two SRNL subject matter experts (SMEs) that were responsible for any cooperation between DOE and JEN. Memorandum of Telephone Conversation between SRO and OHA at 1 (July 19, 2023). SRO stated that both SMEs searched their email inboxes and sent mailboxes for any communications about the agreement from “JEN, DOE-HQ, and SRNL technical.” Email from SRNL to SRO (July 18, 2023); Telephone Memorandum at 1.

SRO issued a first determination letter on June 12, 2023. First Determination Letter from SRO to SRS at 1 (June 12, 2023). This letter explained that some documents responsive to the Appellant’s request had been attached with inapplicable classification markings redacted. *Id.* It further stated that more responsive documents had been located and would be provided after SRO worked through possible exemptions. *Id.* The Appellant does not challenge this determination letter. Email from SRS to OHA (July 11, 2023).

SRO issued a second determination letter on June 14, 2023. Second Determination Letter from SRO to SRS at 1 (June 14, 2023). SRO stated that it had provided three documents in response to the Appellant’s request. *Id.* An email exchange and cost estimate were “provided in their entirety; however [SRO] [] redacted classification markings that no longer apply to the documents.” *Id.* A final document was about technology maturation activities was produced with portions withheld pursuant to FOIA Exemption 3. *Id.*

The Appellant timely appealed to the Office of Hearings and Appeals (OHA) on July 10, 2023. Appeal Letter from SRS to OHA Filings at 1 (July 10, 2023). In its appeal, the Appellant challenges the redaction of portions of an email provided with the second determination letter and the adequacy of the search in regard to its request for communications. *Id.* at 3.

II. Analysis

A. Redactions

FOIA establishes a statutory scheme that allows the public to make requests for agency records. 5 U.S.C. § 552. Under FOIA, agencies may withhold records “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or if “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). Further, an agency cannot redact information simply because

it is non-responsive. *Am. Immigr. Laws. Ass'n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 677–78 (D.C. Cir. 2016).

The Appellant alleges that SRO redacted information from the email that it provided without identifying which FOIA exemption applied to the redaction. Appeal at 2. When asked about the rationale behind that redaction, SRO did not cite any relevant provision of FOIA and later explained that the redacted portion of the email was not, in their view, relevant to the Appellant's request. Email from SRO to OHA (July 17, 2023); Telephone Memorandum at 1 (July 19, 2023). These justifications do not provide a sufficient rationale to redact responsive documents in a FOIA request. Thus, we grant the appeal and remand to SRO to either release the relevant document in its entirety or to provide a proper justification for the redaction.

B. 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., *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)).

The Appellant argues that SRO's search was inadequate because it only found one email exchange, and SRO did not provide “copies of any audio or video communication.” SRO stated that in order to complete their search for relevant communications, it identified two SMEs who were responsible for working with JEN¹ and had them complete a search of their email accounts for emails related to the agreement from “JEN, DOE-HQ, and SRNL technical.” Telephone Memorandum at 1 (July 19, 2023); Email from SRNL to SRO (July 18, 2023). They stated that the searches conducted by both SMEs led to the discovery of one responsive email, and that email was provided to the Appellant. Telephone Memorandum at 1 (July 19, 2023).

OHA asked SRO to help reach out to the SMEs to get a more detailed account of their search. Email from OHA to SRO (July 24, 2023). When asked to describe his search, the first SME (SME 1) said that he searched his computer and email and “focused solely on technical emails and not the dozens of emails with DOE about status and progress in draft contract and estimate language.” Attachment to Email from SRNL to OHA (July 26, 2023). He further explained that he “scrolled

¹ The Appellant also requested information about “other German entities.” FOIA Request at 3. Both SMEs confirmed that there was never any communication related to the WFO with any other German company. Attachment to Email (July 26, 2023); Telephone Memorandum at 1 (July 27, 2023).

through the Inbox and the Sent messages” and “reviewed the content that involved communications with people involved with the project.” *Id.* When asked which time period his search covered, SME 1 stated that he “limited [his] response to October 2021.” *Id.*

The second SME (SME 2) stated that when he was asked to conduct the search, he completed a keyword search of his email account using the names of various points of contact for JEN, including the lawyers and project managers involved in the discussions. Memorandum of Telephone Conversation between SME 2 and OHA (July 27, 2023). He searched his emails from approximately “late 2021” to October 2021.² *Id.* SME 2 said that he did not include emails about setting up phone calls or discussions with DOE employees and DOE contractors about what might end up in a future contract. *Id.*

The searches described by the SMEs are clearly not “search[es] reasonably calculated to uncover all relevant documents.” *Truitt*, 897 F.2d at 542. The searches specifically excluded emails “on the status of the cooperation” that the Appellant had asked for. The searches do not appear to have covered the entirety of the time period where SFO and/or SRNL would have been discussing an agreement “subsequent” to the one that ended in February of 2023. If SRO felt that the Appellant’s request needed to be reformulated to reasonably describe the records sought, then it was obligated to at least attempt to assist the Appellant in doing so. *See* 10 C.F.R. 1004.4(c)(2) (explaining that if a request does not reasonably describe the records sought, the DOE response is required to describe the ways in which a response is lacking and “invite the requester to confer with knowledgeable DOE personnel” to attempt to restate, reformulate, or reduce the size of the request); *see also Ferri v. Bell*, 645 F.2d 1213, 1221 (3rd Cir. 1981) (“An agency may not resist disclosure because the request fails ‘reasonably (to) describe’ records unless it has first made a good faith attempt to assist the requester in satisfying that requirement.”).

While the search conducted here was insufficient, we also note that FOIA does not require agencies to create new records in response to a request. *Kissinger v. Repts. Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980). SRO confirmed that it does not record the phone or video conversations of its employees or contractors nor is it under any obligation to do so. Email from SRO to OHA (July 20, 2023). As such, the fact that no audio or video recordings were provided in response to Appellant’s request is unremarkable.

Accordingly, we remand for SRO to work with the Appellant to clarify the scope of the request, conduct a search responsive to that request, and issue a new determination in light of that search.

III. Order

² While it is not determinative here, it is of additional concern that when asked when he completed his search, SME 1 responded “July 23, 2023.” Attachment to Email (July 26, 2023). SRO issued their determination letter a full month before that date on June 13, 2023. Determination Letter at 1. July 17, 2023, was the date that OHA requested SRO provide our office with any search certificates related to Appellant’s FOIA request. Email from OHA to SRO (July 17, 2023).

When asked the same question, SME 2 stated that he had conducted a search “a couple of months ago” when SRNL first received the FOIA request and then conducted a second search during July 2023. Telephone Memorandum at 1 (July 23, 2023).

It is hereby ordered that the appeal filed on July 10, 2023, by Savannah River Site Watch, FIA-23-0022, is granted. This matter is hereby remanded to SRO, which shall reconsider the redactions made in the released email, clarify the scope of the request with the Appellant, conduct a new search, and 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. § 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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