

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

In the Matter of The Brennan Center)
For Justice)
)
Filing Date: November 17, 2023) Case No.: FIA-24-0007
_____)

Issued: January 17, 2024

Decision and Order

The Brennan Center for Justice (Appellant) appeals a final determination letter (Determination Letter) issued to it from the Department of Energy (DOE), Office of Public Information (OPI) concerning Request No. HQ-2018-01386-F, filed 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 informed the Appellant that the DOE completed its search and identified three records responsive to the FOIA request. Determination Letter from DOE OPI to The Brennan Center for Justice at 2 (August 18, 2023). In this appeal, the Appellant challenges the adequacy of the DOE’s search.¹ Appeal Letter Email from The Brennan Center for Justice to OHA at 2–4 (November 16, 2023). As explained below, we grant the appeal.

I. Background

On July 25, 2018, the Appellant submitted a FOIA request to the DOE, which sought records related to Presidential Emergency Action Documents (PEADs). FOIA Request from The Brennan Center for Justice at 1–4 (July 25, 2018). The Appellant requested the following:

Any records reflecting, setting forth, describing, incorporating, memorializing, discussing, or pertaining to, PEADs; and [a]ny records or compilations of records reflecting, setting forth, describing, incorporating, or memorializing legal authorities other than PEADs that may be invoked during emergencies, including authorities created by presidential order, statute, regulation, or other source, and any guidance regarding those authorities.

FOIA Request at 3.

The Appellant also stated that “[o]n information and belief, agencies maintain compilations of these authorities and possibly internal guidance or interpretation regarding these authorities.” *Id.* at 3–4.

¹ Portions of the responsive records were withheld pursuant to FOIA Exemption 5. Determination Letter at 2–3. The Appellant does not challenge the DOE’s decision to withhold portions of the records in its appeal. Appeal at 1–4.

The Appellant agreed to narrow the timeframe of its request, to records dated after September 12, 2001, and to limit the scope of the search to records related to ten types of emergencies.² Determination Letter at 2–3. The DOE assigned the Appellant’s request to four DOE offices to conduct a search for responsive records: the Office of Cybersecurity, Energy Security, and Emergency Response (CESER); the Office of Nuclear Energy (NE); the Office of Policy (OP); and the Office of the General Counsel (GC). *Id.* at 1. On August 18, 2023, the DOE OPI notified the Appellant that the DOE had identified three records responsive to its request. *Id.* at 2.

On November 16, 2023, the Appellant filed an appeal, in which it claimed the DOE’s search was inadequate because it was not conducted in “good faith.” Appeal at 3. The Appellant also claimed that records it obtained from a different federal agency, pursuant to a prior a FOIA request, indicated that the DOE had “primary responsibility for at least five PEADs and was charged with supporting the implementation of at least one additional PEAD,” in 2004. *Id.* The Appellant also claimed that there are “unquestionably a significant number of responsive records in addition to the three released” to it because it believes the DOE would have been “closely involved in the processing of reviewing the PEADs” within its jurisdiction. *Id.*

II. Analysis

When responding to a FOIA request, an agency’s search must be “reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (quoting *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The reasonableness of an agency’s search is generally determined by reviewing the methods used to conduct a search, not by the results of the search. *Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). An agency is not required to conduct an exhaustive search of each of its record systems, it need only conduct a reasonable search of systems that are likely to uncover responsive records. *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)). In conducting a search, an agency must search in locations where responsive records are likely to be found. *Powell v. IRS*, 280 F. Supp. 3d 155, 162–63 (D.D.C. 2017). Documentation of a search must, at minimum, specify “what records were searched, by whom, and through what process.” *Steinberg v. U.S. Dep’t of Justice*, 23 F.3d 548, 552, (D.C. Cir. 1994). Documentation of a search should also “identify the terms searched” or contain an explanation as to how the search was conducted. *Oglesby*, 920 F.2d at 68. OHA will remand a case where it determines that the search conducted was inadequate, after reviewing the facts of the case. *See, e.g., Ayyakkannu Manivannan*, OHA Case No. FIA-17-0035 (2017).

As part of its review on appeal, OHA obtained the search certificates from CESER and GC. The search certification from CESER indicates that in 2018, the office conducted an automated search of “other records,” but the certificate does not contain a description of the specific record systems that were searched. Search Certificate Form from CESER at 1 (May 28, 2019). When a representative of OHA contacted CESER to obtain more detail about how the search was conducted, OHA learned a search was conducted of a “shared drive” used by the office.

² Specifically, the Appellant agreed to amend its request to seek legal authorities that may be invoked in the event of an electromagnetic pulse, war, an attack by a foreign government, a sudden environmental emergency, a terrorist attack from within the United States, a terrorist attack originating outside the United States, hurricanes, earthquakes, executive declared national emergencies, and a cyberattack on the power grid. Determination Letter at 1–2.

Memorandum of Telephone Conversation between former Federal Records Manager at CESER & OHA at 1 (November 22, 2023). OHA was not able to determine what type of records were held on this shared drive to determine if the search of that drive was likely to uncover responsive records. Furthermore, CESER's search documentation does not contain a sufficiently detailed explanation as to how the search for responsive records was conducted. CESER's search certificate indicates a search was conducted for "Grid Security Emergency Orders." Search Certificate Form from CESER at 1. The certificate does not provide any further details regarding CESER's search. *Id.* Therefore, OHA was not able to determine if the search methods used by CESER were likely to uncover responsive documents.

The search certification prepared by GC indicates a search was conducted of "staff records" and "email accounts." Search Certificate Form from GC at 1 (June 29, 2020). Both descriptions shown on GC's search certificate are vague as to the specific records that were searched for responsive records. *See Matter of Ron Walli*, FIA-20-0018 at 3 (January 28, 2020) (GC's statement that it searched its "internal files and emails" did not provide "specific information" regarding the search and was considered vague). There is no information as to which specific "email accounts" were searched, or which "staff" members were targeted for a search of their records and email accounts. *Id.* Further, GC's search certificate does not identify what terms were used to conduct its search. The space on its certificate designated for search terms indicates: "See request." Search Certificate Form from GC at 1. Because OHA has no information regarding the search terms GC used to conduct its search, we cannot determine whether the search terms that were used were likely to uncover responsive records.

Although GC contends that the Appellant's FOIA request was broad and difficult to interpret, we find there is insufficient information to determine that the searches conducted by GC and CESER were adequate.

As to the remaining program offices that were assigned to conduct a search, documentation provided to OHA indicates that both NE and OP determined that searches of their records systems would be unlikely to uncover responsive documents. Email from Acting Deputy Director, Office of Energy Security, OP, to FOIA Analyst at 1 (January 10, 2019) and Search Certificate Form from Analyst at NE to FOIA Analyst at 1 (November 6, 2018). Therefore, NE and OP determined that they did not have jurisdiction over the Appellant's FOIA request and need not conduct a search. *See Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (finding that, an agency "may not ignore a request to search specific record systems when a request reaches the agency before it has completed its search," but an agency's search is generally adequate where it "has sufficiently explained its search process and why the specified record systems are not reasonably likely to contain responsive records").

Accordingly, based on the information we have been able to obtain, we conclude the searches conducted by GC and CESER were not reasonably calculated to locate records responsive to the Appellant's FOIA request and were therefore inadequate.

III. Order

It is hereby ordered that the appeal filed by The Brennan Center for Justice, on November 17, 2023, Case No. FIA-24-0007, is granted. This matter is remanded to conduct a new search for records responsive to the Appellant's FOIA request and issue a new determination.

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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8601 Adelphi Road-OGIS
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