United States Department of Energy
Office of Hearings and Appeals

In the Matter of Informed Consent Action Network	)		
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Filing Date: November 26, 2024	)	Case No.:	FIA-25-0009
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Issued: November 27, 2024

Decision and Order

Informed Consent Action Network (Appellant) appealed a determination letter sent September 3, 2024,[1] issued to it by the Department of Energy's (DOE) Office of Public Information (OPI) concerning a request (Request No. HQ-2024-02494-F) that it 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. In its determination letter, OPI stated that its search uncovered no responsive records. The Appellant challenged the adequacy of the search. In this Decision, we deny the appeal.

I. Background

On July 12, 2024, the Appellant submitted a FOIA request asking for: "All communications (including but not limited to emails, text messages, direct messages, Teams chats, Slack chats, etc.) sent and received by Steve Koonin from January 1, 2009 through January 1, 2011 to or from N. Dane Scott, Christopher J. Preston, and/or Laurie Yung." FOIA Request from Informed Consent Action Network at 1 (July 12, 2024).

On August 11, 2024, OPI's FOIA Officer emailed the Office of the Chief Information Officer (OCIO), the DOE office that manages the information technology accounts of current and former DOE employees, asking if OCIO had access to former DOE employee Steven E. Koonin's accounts from January 1, 2009 to January 1, 2011. Email from OPI FOIA Officer to OCIO (Aug. 11, 2024). OCIO replied that it did not have possession of the data that would contain Mr. Koonin's accounts for that time period. Email from OCIO to OPI FOIA Officer (Aug. 12, 2024). OCIO also noted that Mr. Koonin did have access to a shared email inbox while employed at DOE, but DOE was no longer in possession of any data related to that inbox either. *Id.* Finally, OCIO explained that typically, DOE does not retain data older than seven years due to data retention policies. *Id.* Because DOE was no longer in possession of any data related to the request, it was determined

[1] The determination letter sent to the Individual was dated August 12, 2024. Determination Letter from OPI to Informed Consent Action Network at 1 (Aug. 12, 2024). However, records provided by the Appellant show that OPI sent the determination letter on September 3, 2024. Determination Letter Email from OPI to Informed Consent Action Network at 1 (Sept. 3, 2024). OPI confirmed that its records showed the determination letter was not sent until September 2024. Email from OPI to OHA (Nov. 26, 2024).

that no responsive records had been located. Email from OPI FOIA Officer to OPI FOIA Analyst (Aug. 12, 2024).

OPI issued a determination letter to the Appellant on September 4, 2024, stating that no responsive documents were located. Determination Letter from OPI to Informed Consent Action Network at 1 (Aug. 12, 2024).

The Appellant timely appealed the determination letter to the Office of Hearings and Appeals (OHA) on November 26, 2024. Appeal Letter Email from Informed Consent Action Network to OHA at 1 (Nov. 25, 2024). In its appeal, the Appellant challenges the adequacy of the search. The Appellant argues that because OPI's response did not provide information regarding how the search was conducted, the response suggests that an adequate search was not conducted. *Id.* at 2.

II. Analysis

As an initial matter, we note that the Appellant points to no regulation or statute that requires OPI to describe its search in its determination letter. Appellant cites *Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994) to argue that OPI must describe its search in the determination. This citation is inapt. *Steinberg* explains that, in a FOIA case, an agency declaration provided to a federal court in support of a motion for summary judgment must be sufficiently specific as to enable a requester to challenge the search procedures. *Id.* It does not make any statement regarding the elements required in an agency's initial determination. DOE regulations state only that "[t]he Authorizing Official or FOIA Officer will prepare a written response . . . [i]nforming the requester that responsive records cannot be located or do not exist." 10 C.F.R. § 1004.5(b)(5). OPI has clearly met the requirements laid out in 10 C.F.R. § 1004.5(b)(5), and, therefore, we find no defect in its determination letter.

Moving on to the adequacy of the search, a FOIA request requires an agency to "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 applicable standard of reasonableness "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). OHA has not hesitated to remand a case where it is evident that the search conducted was in fact inadequate, and whether the search conducted was reasonable depends on the facts of each case. *See, e.g.*, *Ayyakkannu Manivannan*, OHA 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)).

Agency declarations regarding searches are accorded a presumption of good faith. *Cunningham v. Dep't of Justice*, 40 F. Supp. 3d 71 (D.D.C. 2014). Further, "an agency cannot improperly withhold records that it does not maintain, and . . . '[w]here the Government's declarations establish that a search would be futile, the reasonable search required by FOIA may be no search at all.'" *MacLeod*

v. Dep't of Homeland Security, No. 15-cv-1792 (KBJ), 2017 WL 4220398 at *11 (D.D.C. Sept. 21, 2017) (quoting *Reyes v. Envtl. Prot. Agency*, 991 F. Supp. 2d 20, 27 (D.D.C. 2014)).

Here, OPI showed that it reached out to the office most likely to be in possession of data relating to the accounts and communications of former DOE employees, OCIO. OCIO stated that due to retention policies, OCIO does not typically maintain account data older than seven years. Specifically, as to this request, OCIO informed OPI that the data related to the account that belonged to the former DOE employee mentioned in the request had not been retained. As such, any search performed would be futile. Therefore, we find that, here, performing no search was the reasonably calculated search required by FOIA.

III. Order

It is hereby ordered that the appeal filed by Informed Consent Action Network on November 26, 2024, Case No. FIA-25-0009, 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 the right to pursue litigation. OGIS may be contacted in any of the following ways:

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