United States Department of Energy
Office of Hearings and Appeals

In the matter of Mark D. Siciliano	)	
	)	
Filing Date: April 4, 2012	)	Case No.: FIA-12-0019
	)	
	)	

Issued: May 2, 2012

Decision and Order

On April 4, 2012, Mark D. Siciliano (Appellant) filed an Appeal from a determination issued to him on March 8, 2012, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho released one document responsive to the request the Appellant 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. This Appeal, if granted, would require Idaho to conduct an additional search for responsive documents.

I. Background

On February 14, 2012, the Appellant filed a request with DOE Headquarters (DOE/HQ). Request E-mail dated February 14, 2012, from Appellant to DOE/HQ. DOE/HQ forwarded the request to Idaho on February 17, 2012. Memorandum dated February 17, 2012, from Alexander C. Morris, FOIA Officer, Office of Information Resources, DOE, to Clayton Ogilvie, FOIA Officer, Idaho. On March 8, 2012, Idaho responded to the request and released a copy of the Idaho's National and Homeland Security Internal Assessment Review along with its transmittal memo. Determination Letter dated March 8, 2012, from Clayton Ogilvie to Appellant. In the instant Appeal, the Appellant challenges Idaho's search for responsive documents. Appeal Letter dated March 28, 2012, from Appellant to Director, Office of Hearings and Appeals (OHA), DOE.

II. Analysis

In responding to a request for information filed under the 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 which we apply to agency search procedures 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. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).[1/]

A. Item One

The Appellant first asked for the "[f]inal report and all supporting information regarding an assessment . . . of [Idaho] that was conducted in the May-October, 2011 timeframe. Subject of the report concerned the business volume at [Idaho's National and Homeland Security Division] who experienced a significant downward trend in business." Request E-mail. Idaho responded to this request by releasing the final report and the transmittal memo. Determination Letter at 1. In his Appeal, the Appellant states that he asked for "ALL government owned documents that support the findings," not just the final report and transmittal memo. Appeal Letter at 2.

We contacted Idaho to find out what type of search it conducted and its understanding of the scope of the request. Idaho replied that it contacted the person with the most knowledge on the matter to resolve what information existed that was responsive to the request. Idaho was given a number of papers and determined that only the final report, along with its transmittal memo, was responsive to the Appellant's request. Idaho indicated that it understood the request to be for the final report and any information which supported the report's factual conclusion. E-mail dated April 19, 2012, from Clayton Ogilvie to Janet Fishman, Attorney-Examiner, OHA. In his Appeal, the Appellant contends that his request included "all supporting information, including emails, draft reports, interview notes, and all government owned documents." Appeal Letter at 1. Although a requester cannot broaden the request on Appeal, we do not believe that the Appellant has broadened his Appeal by asking for emails and interview notes. *Snake River Alliance*, Case No. TFA-0468 (2011); *Barbara Schwarz*, Case No. VFA-0641 (2001), citing *F.A.C.T.S.*, 26 DOE ¶ 80,132 (1996); *Energy Research Foundation*, 22 DOE ¶ 80,114 (1992); *Cox Newspapers*, 22 DOE ¶ 80,106 (1992); *Bernard Hanft*, 21 DOE ¶ 80,134 (1991); *John M. Seehaus*, 21 DOE ¶ 80,135 (1991). Therefore, we will remand the matter to Idaho to conduct a search for "all supporting" documents, including emails and interview notes. "Drafts of the report," however, are not "supporting documents" and, therefore, are outside the scope of the request and this Appeal. If the Appellant seeks documents outside the scope of the request, the Appellant needs to file another request.

B. Item Two

Second, the Appellant asks for the "[f]inal report and supporting information regarding the Associate Laboratory Director of [Idaho's National and Homeland Security Division] (Dr. KP Ananth) requiring personnel to remain in a room against their will during an extended alarm drill including DOE/HQ assessment of [Idaho] and Battelle Energy Alliance's (BEA) Employee Concerns Programs." Request E-mail. Idaho responded that any responsive documents were maintained by BEA and were not agency records. Determination Letter at 1-2. In his Appeal, the Appellant claims that Idaho's claim that no government-owned documents exist is simply impossible. Appeal Letter at 2.

[1/] OHA FOIA decisions issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/foia1.asp.

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Idaho concluded that the records were neither in the possession or control of Idaho at the time of the request and, therefore, were not agency records. Determination Letter at 1-2. Further, Idaho determined that any documents that may exist were BEA's records under the contract between BEA and DOE. Determination Letter at 1. We agree.

However, the Appellant specifically asked for information from DOE/HQ, which did not conduct a search for responsive records. He supports his claim that documents may exist at DOE/HQ, stating that senior members from DOE/HQ conducted an investigation/assessment into the safety incident at Idaho, and those officials interviewed him. Given that DOE/HQ did not conduct a search for responsive records because it believed all records would be in Idaho, we will remand the matter to DOE/HQ for a determination about whether responsive documents exist at DOE/HQ.

C. Item Three

Third, the Appellant asks for the "[n]ames of individuals that have filed employee concerns with BEA and/or [Idaho] that have rescinded their complaints after 01, August 2011." Request E-mail. Idaho replied that it conferred with the Idaho Employee Concerns Program, which indicated that no employee filing a concern since August 1, 2011, has retracted or rescinded their complaint. Determination Letter at 2. The Appellant asks that OHA remand the matter to Idaho to revisit the request. He states, "[a]t a minimum, due to the importance of a healthy reporting culture, [Idaho] should be ordered to investigate this incident[2/] to determine the validity of this concern." Appeal Letter at 2. This is not a challenge to the adequacy of the search but rather a request for an investigation of an incident, a request that is outside the scope of a FOIA request or appeal. In any event, we believe that the search was reasonable. Idaho contacted the Idaho Employee Concerns Office, which stated that there was no responsive information, and the Appellant has provided no reason to believe otherwise. E-mail dated April 12, 2012, from Clayton Ogilvie to Janet Fishman. Accordingly, we will uphold Idaho's search for this information as reasonable.

III. Conclusion

After considering the Appellant's arguments, we believe that Idaho may possess emails and interview notes that are responsive to the first item of the request. Therefore, we will remand the matter to Idaho to issue a new determination after conducting a search for emails and interview notes. We are convinced that Idaho conducted a search reasonably calculated to uncover the information requested by the Appellant in items two and three of his request. However, DOE/HQ did not conduct a search for information responsive to the Appellant's second item. Accordingly, we will remand the matter to DOE/HQ for a search for documents responsive to

[2/] We assume that the Appellant is referring to the incident he described above where he claims that employees were required to remain in a room where an alarm was blaring. We are unclear how this incident relates to complaints filed with the Employee Concerns Program.

Item two. As the foregoing indicates, the Appeal should be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed by Mark D. Siciliano, Case No. FIA-12-0019, is hereby granted as specified in Paragraph (2) below and denied in all other respects.

(2) The matter is hereby remanded to the Idaho Operations Office and the Department of Energy Headquarters, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 2, 2012