

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

In the Matter of:	Sierra Club)		
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Filing Date:	June 3, 2013)	Case No.:	FIA-13-0036
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Issued: June 26, 2013

Decision and Order

On June 3, 2013, Sierra Club appealed a determination that it received from the Department of Energy’s (DOE) Office of Information Resources (OIR), the DOE office responsible for processing requests for information at DOE Headquarters, in response to the April 5, 2013, request for documents that Sierra Club 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 appeal, Sierra Club challenges the adequacy of the DOE’s search for documents responsive to its FOIA request. This appeal, if granted, would require OIR to conduct a new search for responsive documents.

I. Background

On April 5, 2013, Sierra Club submitted a FOIA request for records pertaining to any DOE procurement contracts to EnSys Energy and Systems, Inc. (“EnSys”) for the preparation of energy market assessments for the Keystone XL Pipeline Project, including, but not limited to the following:

- (1) All documents relating to the DOE’s evaluation or investigation of potential conflicts of interest presented by awarding the contract to EnSys;
- (2) All documents relating to the DOE’s independent verification of EnSys’ answers to the Organizational Conflict of Interest Questionnaire (“OCI Questionnaire”);
- (3) All requests for conflict-of-interest waivers made pursuant to 48 C.F.R. § 9.503, all drafts of such waiver requests, all documents relating to the DOE’s consideration or processing of such waiver requests, and any decision documents made with respect to such waiver request;

- (4) All written analyses, including any recommended courses of action for avoiding, neutralizing, or mitigating an organizational conflict of interest, draft solicitation provisions, or proposed contract clauses prepared pursuant to 48 C.F.R. § 9.506; and
- (5) All contracts or drafts of contracts to which the DOE, Department of State, EnSys, and/or TransCanada are parties that concern the preparation of Environmental Impact Statements for the Keystone XL Pipeline.

See Letter from Alexander Morris, OIR, to Doug Hayes, Sierra Club (May 3, 2013) (Determination Letter) at 1.

In the May 3, 2013, determination, OIR indicated that the DOE's Office of Policy and International Affairs (OPIA) conducted a search and identified two documents responsive to Sierra Club's request. *Id.* OIR released the two documents in their entirety to Sierra Club. *Id.*

After receiving the Determination Letter and the accompanying released documents, Sierra Club filed the instant appeal challenging the adequacy of the DOE's search for responsive documents. Letter from Doug Hayes, Sierra Club, to OHA (received June 3, 2013) (Appeal). Specifically, Sierra Club maintains that the Agency was obligated to comply with certain provisions of the Federal Acquisition Regulations ("FAR") and the Department of Energy Acquisition Regulations ("DEAR") when selecting EnSys as a subcontractor, and compliance with those provisions must have generated more than the two OPIA-identified documents that OIR released. Appeal at 2. Sierra Club further alleges that the absence of additional responsive documents "would indicate that the Department failed to comply with FAR and DEAR." *Id.*

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." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he 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., *Project on Government Oversight*, Case No. TFA-0489 (2011).¹

In response to our inquiry, OIR informed us that, upon receipt of Sierra Club's FOIA request, OIR queried the DOE Headquarters offices most likely to be involved in the subject matter at issue in order to ascertain the appropriate offices to which the request should be assigned. See Email from Vera Dunmore, Lead FOIA/Privacy Act Specialist, OIR, to Diane DeMoura, Attorney-Examiner, OHA (June 6, 2013). Based on responses from various offices, OIR determined that the request should be assigned to OPIA for a search for responsive documents. *Id.* OPIA provided details regarding the scope of its search for responsive documents.

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on OHA's website located at www.energy.gov/oha.

Specifically, the search was performed by a member of the OPIA staff with substantial knowledge of the specific subject matter raised in Sierra Club's FOIA request. That staff member performed a search of OPIA's electronic records, including email archives, using the following search terms: Keystone XL, Keystone, KXL, EnSys, SOW, Statement of Work, Contract. *See* Email from Thomas White, Policy Analyst, OPIA, to Diane DeMoura, Attorney-Examiner, OHA (June 6, 2013). The OPIA staff member confirmed that the search encompassed all of the locations at OPIA where potentially responsive documents could exist. *Id.*

Based on OPIA's description of the scope of its search, we find that OPIA performed an exhaustive search of its own records that was reasonably calculated to reveal records responsive to the Appellant's FOIA request and was, therefore, adequate. Accordingly, we will deny Sierra Club's appeal with respect to the adequacy of OPIA's search.

However, during the processing of this appeal, we learned that there may have been another appropriate DOE Headquarters office, in addition to OPIA, to which Sierra Club's FOIA request should have been assigned. In our discussions with OPIA, we were informed that the type of conflict of interest documentation requested by Sierra Club in its FOIA request is maintained by the Office of Headquarters Procurement Services (HPS), an office within the DOE Office of Acquisition and Project Management. *See* Email from Thomas White, Policy Analyst, OPIA, to Diane DeMoura, Attorney-Examiner, OHA (June 5, 2013); Memorandum of Telephone Conversation between Ryan Miller, Contract Specialist, HPS, and Diane DeMoura, Attorney-Examiner, OHA (June 19, 2013).² In light of this information, we find that the FOIA request should be assigned to HPS for a search.

Accordingly, we will grant the Appeal in part, remanding this matter to OIR. On remand, OIR should assign Sierra Club's April 5, 2013, FOIA request to HPS for a search of HPS records for documents responsive to the FOIA request.

III. Conclusion

As discussed above, we have concluded that OPIA's search for records responsive to Sierra Club's FOIA request was adequate. However, we have further found that another DOE office, HPS, should also have been assigned the FOIA request, and we will remand the matter in order that OIR now assign the request to HPS for a search of its records.

It Is Therefore Ordered That:

- (1) The Appeal filed on June 3, 2013, by Sierra Club, OHA Case Nos. FIA-13-0036, is hereby granted in part as set forth in paragraph (2) below, and is denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy Office of Information Resources for further processing in accordance with the instructions contained in the foregoing decision.

² We make no finding in this appeal regarding the actual existence of any additional responsive documents, or whether such records should exist.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

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