

United States Department of Energy
Office of Hearings and Appeals

In the Matter of UNROW Human Rights Impact)	
Litigation Clinic)	
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Filing Date: July 8, 2013)	Case No.: FIA-13-0049
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Issued: July 25, 2013

Decision and Order

On July 8, 2013, UNROW Human Rights Impact Litigation Clinic (Appellant) filed an Appeal from a determination issued to it on June 19, 2013, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2013-01072-F). In that determination, OIR stated that the document the Appellant requested under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 was under the jurisdiction of the Department of State (DOS). This Appeal challenges the adequacy of OIR’s determination and, if granted, would require OIR to conduct a search for responsive document.

I. Background

On May 16, 2013, the Appellant filed a request with the DOE’s Office of Information Resources (OIR) for a “copy of the cable from the Embassy of the United States in London bearing the reference ID ‘09LONDON1156’ sent on May 15, 2009, with the subject ‘HMG Floats Proposal for Marine Reserve Covering the Chagos Archipelago (British Indian Ocean Territory).’” Request Letter dated April 22, 2013, from Ali A. Beydoun and Erin Louise Palmer, Appellant, to Alexander Morris, FOIA Officer, OIR, DOE (Request Letter). In response to the request, OIR stated that the document was “under the jurisdiction of” the Department of State (DOS). Determination Letter dated June 19, 2013, from Alexander Morris to Appellant. On July 8, 2013, the Appellant filed this Appeal stating that “the DOE is not released from responsibility of fulfilling our request simply because the document originated within another agency.” Appeal Letter dated July 3, 2013, from Appellant to Alexander Morris.^{1/}

^{1/} The Appeal was sent to Mr. Morris by electronic mail message on Wednesday, July 3, 2013. Mr. Morris forwarded it to the Office of Hearings and Appeals (OHA) on Monday, July 8, 2013.

II. Analysis

A. Adequacy of the Determination

After conducting a search for responsive documents under the FOIA, the statute requires that the agency provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption(s) under which information was withheld. *Dykema Gossett, PLLC*, Case No. VFA-0358 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996); *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,767 (1996).^{2/} Without an adequately informative determination letter, the requester and the review authority must speculate about the appropriateness of the agency's determinations. *Id.*

In the present Appeal, OIR did not describe its search. Determination Letter. In fact, OIR did not indicate whether it conducted a search at all. *Id.* We find that the determination OIR issued was inadequate. We will not remand the matter for a new determination, because after receipt of this Appeal, we contacted OIR and established that it did conduct a search. However, OIR neglected to state the results of that search in its determination. We will discuss the search in the next section.

B. Adequacy of the Search

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).

We contacted OIR to determine what type of search was conducted in response to the request. We were informed that OIR contacted the Office of Legacy Management to determine if it had

^{2/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha>.

possession of the requested document. Memorandum of July 8, 2013, Telephone Conversation between Janet R. H. Fishman, OHA, and Alexander Morris, OIR. The Office of Legacy Management stated that it did not have possession of the document and suggested that either the Office of Policy and International Affairs (PI) or the Office of Intelligence and Counterintelligence (IN) may have the document. OIR contacted both offices. PI stated that it did not have possession of the document. *Id.* IN also stated that it did not have possession of the document but suggested that OIR contact DOS to determine if it had the document. *Id.* OIR did contact DOS, which stated that it had received the same request and that the request was under review. Memorandum of July 24, 2013, Telephone Conversation between Janet Fishman and Alexander Morris. OIR also contacted the National Nuclear Security Administration which also stated it did not have possession of the document. Memorandum of July 8, 2013, Telephone Conversation. Finally, OIR contacted the Golden Field Office, which also stated that it did not have possession of the requested document. *Id.*

After receipt of the Appeal, OIR searched the headquarters computer system that included documents from the Secretary's office. Memorandum of July 16, 2013, Telephone Conversation between Janet Fishman and Alexander Morris. OIR conducted a search using the terms London, Chagos, HMG, and Marine. *Id.* The requested document was not within the system. *Id.*

Given the previous information, we find that OIR's search for the requested document was adequate. OIR asked those offices most likely to have the document to conduct a search, and the document was not located. As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller, 779 F.2d at 1384-85.* We will therefore deny the Appellant's Appeal.

III. Conclusion

After considering the Appellant's arguments, we agree that OIR's determination was insufficient. However, we are convinced that OIR conducted a search reasonably calculated to uncover the requested document. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by UNROW Human Rights Impact Litigation Clinic, Case No. FIA-13-0049, is hereby denied.
- (2) 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 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

Date: July 25, 2013