

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

In the Matter of: Cynthia Brown)
)
Filing Date: July 26, 2012)
) Case No.: FIA-12-0044
)
_____)

Issued: August 17, 2012

Decision and Order

On July 26, 2012, Cynthia Brown filed an appeal from a determination issued to her on July 6, 2012, by the Department of Energy's (DOE) Office of Health, Safety and Security (HSS), in Washington, DC (FOIA Request Case No. HQ-2012-01037-F), in response to a request for documents that Ms. Brown 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. HSS did not locate any documents responsive to Ms. Brown's request. In her appeal, Ms. Brown challenges the adequacy of HSS's search. This appeal, if granted, would require HSS to perform an additional search for responsive records, and to either release any newly discovered documents or issue a new determination letter justifying the withholding of those documents.

I. Background

On March 22, 2012, Ms. Brown submitted a FOIA request to HSS at DOE Headquarters in which she sought records pertaining to her late mother.¹ HSS informed Ms. Brown in its July 2012 Determination Letter that HSS was unable to locate any additional documents. Letter from Patricia Worthington, Director of Health and Safety, HSS, to Cynthia Brown, July 6, 2012 (July 2012 Determination Letter) at 1.

Ms. Brown filed the instant appeal challenging the adequacy of HSS's search. *See* Letter from Cynthia Brown to OHA, dated July 26, 2012 (Appeal). In her Appeal, Ms. Brown

¹ In December 2011, Ms. Brown sent a similar FOIA request to the DOE's Richland Operations Office. As a result of that request, Ms. Brown was provided various records concerning her mother. *See Cynthia Brown* Case No. FIA-12-0009 (March 27, 2012).

alleges that HSS's search was inadequate because she did not receive a list of places searched, as well as information regarding a comprehensive list of relevant contracts.²

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). "[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., Todd J. Lemire*, Case No. VFA-0760 (August 26, 2002).³

In reviewing the Appeal, we contacted HSS to ascertain the scope of its search for responsive documents. *See* Email from Pamela Pontillo, OHA, to Dr. Isaf Al-Nabulsi, HSS, August 1, 2012. Dr. Al-Nabulsi explained that HSS contacted Richland Operations Office (RO) because Ms. Brown's mother was a former employee at the Hanford site and her employment ended in 1945. According to Dr. Al-Nabulsi, RO contacted senior records personnel at Kadlec Hospital⁴ and requested that they look for potentially responsive records relating to Ms. Brown's mother in their archives. Kadlec Hospital did not find any responsive material,⁵ but RO suggested she might consider contacting the principal of an environmental consulting company who might have some relevant information. *See* Email from Dr. Isaf Al-Nabulsi, HSS, to Pamela Pontillo, OHA, August 6, 2012.

Dr. Al-Nabulsi also stated that DOE next contacted a senior research analyst from the Office of Legacy Management (LM) who was assigned to oversee HSS search efforts, with regard to Ms. Brown's request, because he was knowledgeable about and involved with the Human Radiation Experiments report dated July 1995.⁶ We also contacted the senior research analyst

² In her Appeal, Ms. Brown states that in follow-up conference calls and e-mails with HSS, she provided website links and contract numbers to facilitate her request for a list of specific contracts in force between August 7-14, 1951, between the U.S. Atomic Energy Commission (AEC) and the University of Chicago Labs and Clinics that might provide clues as to the location of documents responsive to her request.

³ OHA FOIA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

⁴ Kadlec Hospital was established in 1944 to care for workers in the Hanford, Washington area.

⁵ HSS told Ms. Brown in a May 2012 conference call that because the physicians at Kadlec Hospital were not direct employees of the Manhattan Engineer District (MED) or the AEC, they typically retained those records created from research treatment studies, such as those that might have been created concerning Ms. Brown's mother.

⁶ From 1995 through early FY 2006, the records supporting the report were accessioned to the National Archives and Records Administration (NARA). Because DOE no longer has custody of those records, it cannot search them.

to inquire about his scope of search for pertinent documents. The senior research analyst told us that he 1) searched all records in the custody of HSS that are stored at DOE's LM in Grand Junction, Colorado; 2) reviewed manual indexes to the records collected from Oak Ridge National Laboratory during the Human Radiation Experiments initiative and those searches did not locate any responsive documents; 3) contacted the DOE Oak Ridge federal records officer to inquire about any records that may still be in its custody but the records officer had no knowledge of the existence of such records; and, 4) contacted the National Institute for Occupational Safety and Health (NIOSH) which informed him that it did not possess any responsive documents to Ms. Brown's request.⁷ See Email from Dr. Isaf Al-Nabulsi, HSS, to Pamela Pontillo, OHA, August 6, 2012.

In an effort to assist Ms. Brown, HSS, RO and LM participated in a telephone conversation with Ms. Brown on May 10, 2012, and DOE suggested that she submit a FOIA request to the U.S. Department of Defense, and a request for information to the Center for Cancer Research at Johns Hopkins University and at Purdue University.⁸ See Email from Dr. Isaf Al-Nabulsi, HSS, to Pamela Pontillo, OHA, August 6, 2012.

We find that DOE personnel made inquiries beyond what the FOIA requires of them in searching for responsive documents. Based on information provided to us, we find that HSS performed a search reasonably calculated to reveal records responsive to Ms. Brown's FOIA request. HSS collaborated with knowledgeable officials to ascertain where responsive documents might exist and had searches made of those locations. Accordingly, we find that the search was adequate for purposes of the FOIA and the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on July 26, 2012, by Cynthia Brown, OHA Case No. FIA-12-0044, 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 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:

⁷ Although NIOSH did not have any responsive records, it indicated that potentially responsive records from the MED medical research for the period may reside with the National Security Archive at George Washington University. HSS included an internet link to this facility in its July 2012 Determination Letter to Ms. Brown.

⁸ This suggestion was based on historical relationships of those entities with the MED, AEC, and the Billings Hospital of the University of Chicago.

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