

United States Department of Energy
Office of Hearings and Appeals

In the matter of the Native Hawaiian Legal Corporation.)
)
)
Filing Date: October 12, 2012) Case No.: FIA-12-0063
)
_____)

Issued: October 31, 2012

Decision and Order

On October 12, 2012, the Native Hawaiian Legal Corporation (“Appellant”) filed an Appeal from a determination issued to it on September 11, 2012, by the Golden Field Office (GFO) of the United States Department of Energy (DOE) (FOIA Request Number GO-12-296). In its determination, the GFO responded to the Appellant’s request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. Specifically, the Appellant contends that additional documents exist that are responsive to its FOIA request. Thus, this Appeal, if granted, would require the GFO to provide the requested additional documents to the Appellant.

I. Background

On June 29, 2012, the Appellant submitted a FOIA request to the FOIA Requester Service Center at DOE Headquarters, for documents related to the Energy Agreement between the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, and the Hawaiian Electric Companies (“Energy Agreement”), and specifically, the “Big Wind Projects” component of the Agreement. This request was forwarded to several DOE offices including the GFO. In its September 11, 2012, determination letter, the GFO provided the Appellant with 456 pages of documents, with some information redacted, pertaining to a wind grant awarded to the Hawaiian Electric Company (HECO) in 2009.¹

The Appellant challenges the adequacy of the GFO’s search and claims that, based on the information contained in HECO’s wind grant application and related documents, additional

¹ The GFO also informed the Appellant that its FOIA request was also being processed by two other DOE offices – the DOE Office of Electricity Delivery and Energy Reliability and the DOE Office of Energy Efficiency and Renewable Energy.

documents should have been produced in response to its FOIA request. Specifically, the Appellant avers that the GFO should have provided the following documents: (1) status reports as required by DOE; (2) list of candidate monitoring locations, a monitoring and deployment plan, field campaign experience and recommendations report and a utility implementation plan; and (3) a transition assessment plan. Additionally, the Appellant believes that the following documents exist: (1) quarterly progress reports; (2) an annual special status report; (3) final scientific report; and (4) conference papers.

In its response to the Appeal, the GFO asserts that the documents it provided to Appellant, were, in fact, not responsive to its FOIA request, but were provided to the Appellant as an accommodation. *See* Response from Kimberly L. Graber, Legal Counsel, and Michele Altieri, FOIA Officer, to Shiwali Patel, Attorney-Examiner, OHA, Oct. 19, 2012 (“GFO Comment”). Specifically, the GFO states that the 456 pages of documents pertain to a HECO wind grant awarded in 2009 under a separate funding opportunity, Announcement DE-PS36-09GO9909, “20% Wind by 2030: Overcoming the Challenges,” and is therefore, not related to the Energy Agreement that is the subject of the Appellant’s FOIA request.² *Id.* at 2. As to the Appellant’s FOIA Request, the GFO was unable to locate any responsive documents.

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).³

As an initial matter, we find the Appellant’s argument unavailing. As explained above, the named documents are related to the 2009 HECO wind grant application, and not the Energy Agreement that is the subject of the Appellant’s FOIA request.⁴ As these documents are non-responsive to the Appellant’s FOIA request for documents relating to the Energy Agreement, they provide no evidence that the GFO’s search in response to the Appellant’s FOIA Request

² In that same vein, the GFO argues that the Appellant’s enumeration of additional documents in its FOIA Appeal is essentially a new FOIA request. *Id.* at 4-5.

³ Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>.

⁴ GFO advised the Appellant that if the Appellant wanted further information on the HECO wind grant, it would need to modify its FOIA request to specifically ask for documents related to that grant. *Id.* The Appellant declined to modify its FOIA request.

was inadequate.⁵ Nevertheless, we conducted an examination of the GFO's search to determine the adequacy of its search in response to the Appellant's request for documents relating to the Energy Agreement.

In response to our inquiries, the GFO informed us that a project officer with the GFO's Wind and Water Program conducted the search electronically through the Energy Efficiency Renewable Energy (EERE) Project Management Center Database. *See* E-mail from Michele Altieri, GFO FOIA/PA Officer, to Shiwali Patel, Attorney-Examiner, OHA, Oct. 15, 2012. The following terms were used to electronically search the Database:

- "Energy Agreement among the State of Hawaii, Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs and the Hawaiian Electric Companies."
- "Hawaiian Electric Company"
- "Hawaiian Electric"
- "Hawaiian"
- "Hawaii"
- "Big Wind"

Id.

Despite using these search terms, no responsive documents related to the Energy Agreement were found. *See* GFO Comment.

Based on the foregoing, we find that the GFO's search was reasonably calculated to uncover all relevant documents in response to the Appellant's FOIA request concerning the Energy Agreement, and was therefore, adequate. The GFO's search of the six terms on the EERE Project Management Center Database includes all of the most obvious search terms that would likely uncover the requested documents specifically pertaining to the Energy Agreement. Further, the GFO does not enter into energy agreements such as the subject of the Appellant FOIA Request. Given the information provided to us, we find that the GFO conducted an adequate search under the FOIA for responsive documents.⁶ Consequently, we will deny the Appellant's Appeal.

⁵ Indeed, on August 13, 2012, the GFO sent an email informing the Appellant about the non-responsive documents. The email stated:

As we discussed, using the above parameters, Golden has found 456 pages that while not directly related to the Energy Agreement, Hawaiian Big Wind projects or William Parks, do cover a wind project in Hawaii – "The 2009 grant application submitted for Funding Opportunity Number DE-PS36-09GO99009 – '20% Wind by 2030: Overcoming the Challenges' by the Hawaiian Electric Company entitled 'Hawaii Utility Integration initiatives (H.U.I.) to Enable Wind.'"

GFO Comment, Ex. E: E-mail from Michele Altieri, GFO FOIA/PA Officer, to Sharla Manley, Staff Attorney, Native Hawaiian Legal Corporation, Aug. 13, 2012.

⁶ We note that the Appellant's FOIA Request is also being processed at the DOE Office of Electricity Delivery and Energy Reliability and the DOE Office of Energy Efficiency and Renewable Energy. When the Appellant receives determination from those offices it may appeal them to OHA.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on October 12, 2012, OHA Case Number FIA-12-0063, 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:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 31, 2012