

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

In the Matter of Michael J. Kelly)	
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Filing Date: February 14, 2013)	Case No.: FIA-13-0008
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Issued: March 13, 2013

Decision and Order

On February 14, 2013, Michael J. Kelly (Appellant) filed an Appeal from a determination issued to him by the Environmental Management Consolidated Business Center (EMCBC) of the Department of Energy (DOE) (Request No. EMCBC-2013-0003-F). In that determination, EMCBC stated that it did not find any documents 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 EMCBC to conduct a further search for responsive documents.

I. Background

On November 26, 2012, the Appellant filed a request with EMCBC for his employment records with Fluor B&W (Fluor) and for all the information related to the investigation conducted by Fluor representatives regarding a complaint filed by Joshua Chavez against the Appellant. Request Letter dated November 26, 2012, from Appellant to EMCBC. EMCBC indicated that it had no documents responsive to the request. Determination Letter from EMCBC to Appellant. On February 14, 2013, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging EMCBC's claim that it had no responsive documents. Appeal Letter received February 14, 2013, from Appellant to Director, 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." *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 EMCBC to determine what type of search was conducted. EMCBC informed us that it contacted the EMCBC security specialist, who stated that the records were not agency records and not in the possession of EMCBC. Email dated February 28, 2013, from Rochelle Zimmerman, EMCBC, to Janet Fishman, OHA, DOE. EMCBC further indicated that it contacted Flour's General Counsel, who confirmed that the documents were Flour's employment records and not agency records. *Id.*

Although the Appellant did not challenge EMCBC's claim that any responsive documents are not "agency records" but rather contractor records and, therefore, not subject to the FOIA, we must address that issue here. 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). The contract between Fluor and EMCBC indicates that any employment information is the property of the contractor, *i.e.*, Fluor. DOE Contract No. DE-AC30-10CC40017 (DEAR § 970.5204-3, "Access To And Ownership of Records"). The Appellant requested his employment record and information into an investigation of a complaint filed against him. As stated above, EMCBC confirmed with the security specialist that Fluor maintains control over their own employment records and such records are not created or obtained by EMCBC. February 28, 2013 Email

However, a finding that certain documents are not agency records does not end our inquiry. The DOE's FOIA regulations state: When a contract with the DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under the FOIA. 10 C.F.R. § 1004.3(e). As stated above, EMCBC confirmed with the security specialist that EMCBC does not have possession of the requested records. February 28, 2013, Email. In addition, the contract between DOE and Fluor states that employment records are contractor records. DOE Contract No. DE-AC30-10CC40017 (DEAR § 970.5204-3, "Access To And Ownership of Records").

Based on the foregoing, we are satisfied that the EMCBC has conducted an adequate search for documents that are responsive to the Appellant's FOIA request. 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. EMCBC contacted the person most likely to know whether the requested documents were in the possession of EMCBC. Further, under the contract between Fluor and EMCBC, all employment records are classified as contractor records and, therefore, are not subject to the provisions of the FOIA.

III. Conclusion

After considering the Appellant's claim, we conclude that a reasonable search for responsive documents was conducted and that the requested information is not an agency record nor in the possession of EMCBC. Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Michael J. Kelly, Case No. FIA-13-0008, 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.

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Director
Office of Hearings and Appeals

Date: March 13, 2013