



Massey, Jr., at 1 (June 4, 2013). Subsequently, on June 18, 2013, OHA received the Appellant's Appeal of the HSS's determination, wherein Appellant challenges the adequacy of the search for responsive records.

The Director, Office of Hearings and Appeals, referred this appeal to my office pursuant to a memorandum dated April 10, 2013, which delegated his authority, in cases that he would refer to me, to issue appellate decisions, as appropriate, under the FOIA and the Privacy Act, consistent with the purposes of the relevant Acts, as implemented by DOE FOIA and Privacy Act regulations, 10 C.F.R. Parts 1004 and 1008.

## 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).

In its appeal, Appellant challenges the adequacy of the search for responsive records. Upon review of the search conducted by HSS, we are satisfied that HSS conducted an adequate search for responsive records.

The OIR initially assigned the request to HSS to conduct a search for responsive records and to respond to the request. In response to our inquiries, HSS provided us with information pertaining to the search that it conducted. HSS indicated that it conducted a search for the name of Poli Marmolejos within the Access Control System Electronic Card Reader Database specifically for the access control point to the FOHO Men's locker room, and that this search returned no results for any occasions where Mr. Marmolejos would have swiped his HSPD-12 badge to enter the FOHO Men's locker room during the time period requested. Memorandum of telephone conversation between Mike Hamar, Physical Security Specialist, Office of Physical Protection, HSS, and Sean Tshikororo, Attorney-Adviser, Office of General Counsel (July 3, 2013, 11:29AM EDT). HSS also informed us that the separate log-in entry system used by the FOHO contractor to log time and use of the FOHO gym by FOHO members was not a part of the HSS system of records, and therefore HSS did not have access to any records that FOHO might have acquired through it. *Id.*

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. Here, HSS searched the Access Control System Electronic Card Reader Database specifically for the access control point to the FOHO Men's locker room. Since HSS does not keep any records of when DOE employees enter the FOHO gym itself, a search of records indicating when the DOE employee

named in the request entered the FOHO locker room would be reasonably calculated to identify documents responsive to the Appellant's FOIA request.

Furthermore, any records that FOHO might have acquired pertaining to when a specific FOHO member logged into the FOHO gym, via the FOHO contractor's log-in entry system for the gym, would be records in the possession of FOHO, not HSS or any other office within DOE. FOHO – the Forrestal Occupational Health Organization – is not an organization within DOE or the federal government. FOHO is owned by its members, is operated through its Board of Directors, and is managed by FOHO's contractor Health Fitness Corporation (HFC). Those Headquarters DOE employees and DOE contractor employees who wish to become FOHO members must submit an enrollment form and pay dues to FOHO. See DOE's description of FOHO on the DOE website, found online at <http://energy.gov/hc/foho-and-goho>. See also the FOHO Membership Enrollment Form at 2-3, 10, found online at [https://powerpedia.energy.gov/w/images/f/ff/FOHO\\_Enrollment\\_Package.pdf](https://powerpedia.energy.gov/w/images/f/ff/FOHO_Enrollment_Package.pdf). The FOHO Membership Enrollment Form, at 4, provides that FOHO's managing contractor HFC “will provide DOE with *aggregate* data about program participants on a quarterly basis but will *never* provide information about you specifically” (emphases in original).

To determine whether documents are agency records subject to the FOIA, we ask (1) whether the organization is an “agency” for purposes of the FOIA; and (2) whether the requested documents are “agency records.” See, e.g., *Faye Vlieger*, Case No. TFA-0250 (April 11, 2008). A private organization may be considered a federal agency if it is controlled by the federal government. *Forsham v. Harris*, 445 U.S. 169, 180 (1980). DOE does not supervise the daily operations of FOHO, as FOHO is a member-owned organization whose daily operations are overseen by FOHO's Board of Directors, and managed by FOHO's contractor HFC. We therefore conclude that FOHO is not controlled by the federal government, and is not an agency for purposes of the FOIA.

As to whether FOHO's documents are “agency records,” the FOIA does not specifically set forth the attributes that a document must have in order to qualify as an agency record. The United States Supreme Court addressed this issue in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are “agency records” for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. The federal courts have identified four relevant factors to consider in determining whether a document was under an agency's control at the time of a request:

- (1) The intent of the document's creator to retain or relinquish control over the document;
- (2) The ability of the agency to use and dispose of the record as it sees fit;
- (3) The extent to which agency personnel have read or relied upon the record; and
- (4) The degree to which the record was integrated into the agency's record system or files.

See, e.g., *Burka v. Dep't of Health and Human Services*, 87 F.3d 508, 515 (D.C.Cir. 1996); see

*also Donald A. Verrill, Case No. TFA-0364 (May 4, 2010).*

FOHO clearly does not intend to relinquish to DOE control over FOHO's records pertaining to its individual, specific members, as evidenced by FOHO's statement on its membership enrollment form that FOHO's managing contractor HFC will provide DOE with only aggregate data about program participants on a quarterly basis, but will never provide information about them specifically. FOHO Membership Enrollment Form at 4. The additional information provided by HSS – that the log-in entry system used by the FOHO contractor to log time and use of the FOHO gym by FOHO members was not a part of the HSS system of records, and that HSS did not have access to any records that FOHO might have acquired through it – also indicates that DOE cannot use and dispose of FOHO records as DOE sees fit, that DOE personnel have not read or relied upon FOHO records, and that FOHO records are not integrated into DOE's record system or files. Therefore, we conclude that any FOHO records regarding log-in/access by individual, specific members to the FOHO gym are not agency records for purposes of the FOIA. We therefore conclude that HSS conducted an adequate search for responsive documents.

However, we note that the Appellant requested, in the March 11, 2013 FOIA request, that DOE check all systems of records, including those in the possession of the named employee, who works in OHA. We conclude that the search should have been assigned to OHA, in addition to HSS. Accordingly, we will grant the Appeal to the extent that we will remand this matter back to OIR with directions that OIR assign the request to OHA for OHA to conduct a search for responsive records, and that OIR then issue a new determination with respect to OHA's search.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on June 18, 2013, OHA Case Number FIA-13-0041, is hereby granted as specified in paragraph (2) below and denied in all other respects.

(2) This matter is hereby remanded to the Office of Information Resources for additional proceedings consistent with the directions set forth in this Decision.

(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.

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Robert F. Brese  
Chief Information Officer  
U.S. Department of Energy

Date: July \_\_, 2013