

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

In the Matter of Protect Our Communities )  
Foundation, Backcountry Against Dumps, and )  
Donna Tisdale ) Case No.: FIA-13-0066  
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Filing Date: October 21, 2013 )  
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Issued: November 4, 2013

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**Decision and Order**  
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On October 21, 2013, The Protect Our Communities Foundation, Backcountry Against Dumps and Donna Tisdale (“the Appellants”) filed an Appeal from a determination issued them on September 20, 2013, by the Office of Information Resources (OIR) of the United States Department of Energy (DOE) (FOIA Request Number HQ-2013-00973-F). In its determination, OIR informed the Appellants that the DOE Office of Electricity Delivery and Energy Reliability (OE) conducted a search for documents responsive to their 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. OIR stated that OE located only two responsive documents, but that it withheld those documents in part pursuant to Exemption 5. 5 U.S.C. § 552(b)(5). This Appeal, if granted, would require OIR and OE to conduct another search for responsive documents.

**I. Background**

The Appellants submitted a FOIA Request on April 26, 2013, with a list of seven items that it was requesting from DOE. *See* FOIA Request, submitted by Stephan C. Volker, on behalf of Appellants (Apr. 26, 2013). The Appellants are community organizations and a member of those organizations, whose “goals are to safeguard the communities, public lands, and natural resources of rural San Diego and Imperial counties, and keep the public apprised of regional developments.” *Id.* at 3. They contend that the requested documents “would reveal how DOE reviews and approves infrastructure projects in the region, and how the agency complies with and enforces laws protecting golden eagles and other wildlife that live in and use the area.” *Id.* at 4.

On September 20, 2013, OIR issued its determination on the Appellants’ FOIA Request, stating that OE conducted a search for responsive records and located two documents that it withheld in part pursuant to Exemption 5. *See* Determination Letter from Alexander C. Morris, FOIA

Officer, OIR, to Stephan C. Volker (Sept. 20, 2013). OIR further stated that portions of the withheld information originated with the Department of Justice (DOJ), Environmental and Natural Resources Division, and that DOJ will respond to the Appellants' FOIA Request with respect to those redactions.

On October 18, 2013, the Appellants appealed OIR's determination, stating that OIR neither conducted an adequate search for responsive documents nor produced all responsive documents that should be in its possession. *See* Appeal. Specifically, they claim that OIR should have produced the surveys sought in Item 1<sup>1</sup> of its FOIA Request. *Id.* The Appellants further asserted that they independently located a copy of a responsive document, which is a letter dated August 29, 2011, that was sent to the Director of DOE's Office of Indian Energy Policy and Programs (Office of Indian Energy), but was never produced by OIR or OE. *Id.* In addition, they complain that OIR failed to specify which of the seven requested items OIR responded to when it provided the two redacted documents. *Id.* Finally, on October 21, 2013, the Appellants submitted an Addendum to their Appeal, complaining that they were prejudiced by OIR issuing its determination five months after they submitted their FOIA Request. Thus, the Appellants request that OHA issued a decision on its Appeal within twenty working days, or by November 18, 2013.

On October 22, 2013, OIR explained that the documents it provided to the Appellants are responsive to Item 7 of their FOIA Request as it consists of email correspondence that refer to the "BGEPA," "ESJ," and "Bald Golden Eagle Protection Action." *See* Email from Lori Twardzik, FOIA Analyst, OIR, to Shiwali Patel, Attorney-Examiner (Oct. 22, 2013). The OIR further described its search methodology, which is explained below.

## 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., Todd J. Lemire*, Case No. VFA-0760 (2002).<sup>2</sup>

In response to our inquiries, OIR explained that it forwarded the FOIA Request to OE to conduct a search of relevant parties' emails and documents, with a keyword search of the items listed in the Appellants' FOIA Request. *See* Email from Lori Twardzik, FOIA Analyst, OIR, to Shiwali Patel, Attorney-Examiner (Oct. 22, 2013); *see also* Memorandum of Telephone Conversation

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<sup>1</sup> "Copies of the 2010 'ground and helicopter surveys' done by the Wildlife Research Institute ('WRI') in order to identify, map, and determine the status of golden eagle nests in the vicinity of the Tule Wind Project proposed to be located northwest of the ESJ U.S. Transmission Line Project site."

<sup>2</sup> Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

with LaTrecia Frieson, Records Program Support Analyst (Oct. 29, 2013). Specifically, OIR requested a search of the following: 1) the “2010 ground and helicopter surveys” requested in Item 1 of the FOIA Request, and 2) the terms: “Tule Wine Project,” “Wildlife Research Institute (WRI),” “Energia Suarez U.S. Transmission Line,” “John David Bittner,” “Golden Eagle Protection Act,” “2010 Ground Helicopter Surveys,” and “April 18, 2013 conviction.” *See* Memorandum from Kevin T. Hagerty, Director, OIR, to Robbie Green, Acting Associate Chief Information Officer, CIO (Jul. 9, 2013). OIR requested the search be limited to documents from June 2010 to the present. *Id.* However, after conducting a search of the OE subject matter expert’s emails,<sup>3</sup> OE could not locate the surveys requested in Item 1 of the FOIA Request and only located the two documents that it provided to the Appellants with redactions. *See* Email from Lori Twardzik, FOIA Analyst, OIR, to Shiwali Patel, Attorney-Examiner (Oct. 28, 2013). OIR stated that copies of the survey may instead be in the possession of WRI. *Id.* As the search “does not require absolute exhaustion of all files,” just a “search reasonably calculated to uncover the sought materials,” we conclude that OE conducted an adequate search for responsive documents. *See Miller*, 779 F.2d at 1384-85.

Moreover, we inquired with OIR as to why the August 29, 2011, letter, which was sent to the Director of the Office of Indian Energy, was not produced. OIR informed us that it forwarded the Appellants’ FOIA Request to the Office of Indian Energy to conduct a search of its files for additional responsive records. Email from Lori Twardzik, FOIA Analyst, OIR, to Shiwali Patel, Attorney-Examiner (Oct. 23, 2013). Accordingly, we will deny this Appeal in part as to the adequacy of the search conducted by OE and deny this Appeal in part as moot as the Office of Indian Energy is currently conducting a search for responsive records.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Stephan C. Volker, Esq., on behalf of the Appellants on October 21, 2013, OHA Case Number FIA-13-0066, 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:

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<sup>3</sup> OE informed us that it only conducted a search of the subject matter expert’s (SME), Brian Mills, emails because he did not have any files stored on his computer regarding the documents requested. *See* Memorandum of Telephone Conversation with LaTrecia Frieson, Records Program Support Analyst (Oct. 30, 2013). The SME who worked on the Energia Sierra Juarez Transmission Line Environmental Impact Statement, and who may have had responsive documents stored in his computer, retired a year ago. *Id.* Accordingly, that person’s files were expunged 60 days after he left the agency. *Id.* Thus, any responsive documents that may have been in the possession of OE would have been with Brian Mills through his electronic correspondence. *Id.*

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