# United States Department of Energy Office of Hearings and Appeals

) )

In the Matter of National Security Archive

Filing Date: January 14, 2014

Case No.:

FIA-14-0004

Issued: January 28, 2014

#### **Decision and Order**

On January 14, 2014, the National Security Archive ("Appellant") filed an Appeal from a determination issued to it on December 19, 2013, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (FOIA Request Number 11-00379-J). In its determination, NNSA 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 the search for responsive documents was inadequate.

## I. Background

On June 3, 2011, the Appellant submitted a FOIA request to NNSA requesting copies of "any reports on Department of Energy investigations during 1977-1979 on security conditions at the URENCO gas centrifuge uranium enrichment facility at Almelo, Netherlands, and the theft of information on gas centrifuge technology by Pakistani technologist A.Q. Ghan." *See* Determination Letter from Elizabeth Osheim, Authorizing and Denying Official, NNSA, to William Burr, George Washington University, National Security Archive (Dec. 19, 2013). On December 19, 2013, NNSA issued a determination on the FOIA Request, informing the Appellant that the Office of Nonproliferation and International Security (NIS) conducted a search for documents and could not locate any responsive documents.

In the instant Appeal, the Appellant challenges the adequacy of the search and argues that DOE should search its "historical archives, records of DOE Legacy Management, and/or records of the former Energy Research Development Administration." *See* Appeal.

## 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 response to our inquiries, NNSA provided us with additional information to evaluate the reasonableness of its search. NNSA stated that it requested NIS to conduct a search for responsive documents and that NIS "lead[s] bilateral physical protection assessments of U.S.obligated nuclear material in foreign facilities." See Email from Theresa Sullivan, Document Specialist, NNSA/OGC, to Shiwali Patel, Attorney- Examiner, OHA (Jan. 17, 2014). It searched "[i]nformation related to physical protection assessments conducted by DOE and its predecessor agencies in the Netherlands in the 1970s." See id. NIS reviewed the hard copy files for Netherlands, "which still contains information regarding assessments conducted in the timeframe of the request." See id. However, it could not locate a file referencing the URENCO gas centrifuge uranium enrichment facility. See id. Indeed, NNSA stated that its "records indicate that no DOE assessment was conducted at the URENCO gas centrifuge enrichment facility at Almelo from 1977-1979." See id. Furthermore, as to Appellant's request for reports on the "theft of information on gas centrifuge technology by Pakistani technologist A.Q. Khan," NNSA stated that NIS and its predecessor offices would not have any responsive records as it "never had a programmatic mandate to conduct investigations on the theft of information from foreign companies." Email from Theresa Sullivan, Document Specialist, NNSA/OGC, to Shiwali Patel, Attorney- Examiner, OHA (Jan. 22, 2014). Based on the foregoing, we are satisfied that NNSA 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.

Finally, we contacted the Office of Information Resources (OIR) to inquire why the FOIA Request was not forwarded to other DOE Offices to conduct searches for documents, as requested by the Appellant. *See* Email from Shiwali Patel, Attorney-Examiner, OHA, to Alexander Morris, FOIA Officer, OIR (Jan. 23, 2014). In response, on January 23, 2014, OIR forwarded the Appellant's FOIA Request to the Office of Legacy Management (LM) and Office of History and Heritage Resources (OHHR) to conduct a search for responsive documents. *See* Email from Alexander Morris, FOIA Officer, to John Montgomery, LM, and Terry Fehner, OHHR (Jan. 23, 2014). Thus, those searches are pending. Once the Appellant receives a response from those other offices, it may appeal those determinations if not satisfied by them.

Thus, for these reasons, we will deny this Appeal.

#### It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on January 14, 2014, OHA Case Number FIA-14-0004, is hereby denied.

<sup>\*</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.

(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: January 28, 2014