United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Tim Hadley   )
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Filing Date: October 31, 2014   )   Case Nos.:   FIA-14-0072
)   FIA-14-0073
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Issued: November 21, 2014

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Decision and Order

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On October 31, 2014, Tim Hadley (the Appellant) appealed determinations that he received from the Department of Energy (DOE) Office of Headquarters Procurement Services (Procurement) on October 27, 2014, in response to requests for documents (Request Nos. HQ-2014-01475-F and HQ-2014-01476-F)[1] that he 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. In the determinations, Procurement stated the searches conducted in response to the Appellant's FOIA requests yielded no responsive documents. As explained below, we have determined that the Appeals should be denied.

I.   Background

The Appellant filed two separate FOIA requests with Procurement. In his first request (FOIA # HQ-2014-01475-F), the Appellant requested "copies of all documents/records of all contracts, task orders, etc., that have no deliverables associated with them as referenced in [an email between members of the DOE Office of the Inspector General (OIG)] dated 05/06/14 at 11:07AM." Letter from Frederick G. Dann, Contract Specialist, Procurement, to Tim Hadley (October 27, 2014) (Determination Letter 1). In a related second request, the Appellant sought "copies of all records, contracts, task orders, agreements[,] etc.[,] that Progress energy service company submitted under its ARAA [*sic*] grant ($200 million) which contained no deliverables." Letter from Frederick G. Dann, Contract Specialist, Procurement, to Tim Hadley (October 27, 2014) (Determination Letter 2). On October 27, 2014, Procurement issued final determinations in which it stated that Procurement did not have any documents responsive to the Appellant's FOIA requests. *See* Determination Letter 1 and Determination Letter 2. Upon receipt of the determination letter, the Appellant filed the instant Appeals. Emails from Tim Hadley to OHA (October 31, 2014) (hereinafter, "the Appeals").

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[1] The Appellant's appeals of the determinations in FOIA # HQ-2014-01475-F and FOIA # HQ-2014-01476-F have been designated as OHA Case Nos. FIA-14-0072 and FIA-14-0073, respectively.

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).[2]

In response to our inquiry in this case, Procurement informed us that, upon receipt of the Appellant's FOIA requests, it queried the personnel with the most knowledge of the subject matter of the requests regarding the existence of responsive documents. According to Procurement, it first attempted to clarify the reference to "no deliverables" in the May, 6, 2014, email that the Appellant cited in his first request. After speaking with Procurement and OIG staff involved in the email discussion, Procurement attributed the reference to a miscommunication between individuals from the two offices. Email from Frederick G. Dann, Contract Specialist, Procurement, to Diane DeMoura, Attorney-Advisor, OHA (November 17, 2014). Procurement further informed us that it consulted with experienced Procurement personnel regarding the existence of contracts, agreements or other projects that contained "no deliverables," as referenced in the Appellant's FOIA requests. Based on the responses of the subject matter experts, Procurement determined that no documents responsive to the Appellant's requests exist because all contracts, task orders, agreements, planning tasks, etc., contain deliverables. *Id*.

The FOIA pertains to those documents in an agency's possession at the time of a request. The statute does not require an agency to compile or create records for the purposes of satisfying a FOIA request. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d). *See also Cause of Action*, Case No. FIA-13-0015 (2013); *Tarek Farag*, Case No. TFA-0365 (2010). Consequently, in light of Procurement's statement regarding the non-existence of responsive documents, we will deny the instant Appeal.

It Is Therefore Ordered That:

(1) The Appeals filed on October 31, 2014, by Tim Hadley, OHA Case Nos. FIA-14-0072 and FIA-14-0073, are 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.

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[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on OHA's website located at www.energy.gov/oha.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 21, 2014