



access copies of the presentations from the Workshop. *Id.* at 19. OPI redacted the URL link and password contained in E-mail 2 pursuant to Exemption 5. *Id.*

On May 21, 2019, DOE's Office of Hearings and Appeals (OHA) received the Appeal. The Appeal asserted that OPI had "improperly with[e]ld final versions of presentations provided to non-governmental third parties at [the Workshop]" pursuant to Exemption 5. Appeal at 3. Appellant also asserted that OPI failed to conduct an adequate search for responsive records because it failed to access the presentations by clicking the URL link provided in E-mail 2, and that OPI was obliged to disclose any reasonably segregable portions of the presentations. *Id.* at 2, 4.

## II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B). An agency is also required to "consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of a requested record is not possible[] and take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

### A. Adequacy of OPI's Search

In responding to a request for information filed under the FOIA, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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., *Ralph Sletager*, OHA Case No. FIA-14-0030 (2014).

In this case, OPI contacted DOE's Chief Information Officer to search the e-mail accounts of the DOE officials specified in Appellant's FOIA request for responsive communications. The Appeal asserts that "[d]ocuments which were included in an email intended to be read with correspondence to individuals named in [Appellant]'s FOIA request are responsive material, and should have been located and provided to [Appellant]." Appeal at 2.

It is not clear whether Appellant is asserting that the presentations circulated by the Event Coordinator were a single record together with E-mail 2 by virtue of being "included in an e-mail," or were separate records that should have "been located" by OPI. If the presentations and E-mail 2 are deemed a single record, then OPI necessarily located the presentations when it located E-mail 2 and its decision to deny Appellant access to the presentations by redacting the link and password needed to view them must be assessed under Exemption 5. If the presentations are deemed separate records from E-mail 2, then we see no reason OPI would have been required to search for them because Appellant's FOIA request was limited to "correspondence" and the presentations are

clearly not correspondence. In either case, we do not perceive any defect in the manner in which OPI conducted its search for records responsive to Appellant's FOIA request.

### **B. Applicability of Exemption 5 to E-mail 2**

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The U.S. Supreme Court has interpreted this provision to "exempt those documents, and only those documents that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

OPI withheld the disputed portion of E-mail 2 on the basis that it "included pre-decisional discussions between DOE staff" and stated that "the quality of agency decisions would be adversely affected if frank, written discussion of policy matters were inhibited by the knowledge that the content of such discussion might be made public." Determination Letter at 2. E-mail 2 is a communication from a private individual to both DOE staff and private individuals, not an internal discussion between DOE staff. Appeal at 19. Moreover, it is not apparent that DOE staff prepared the presentations circulated via the URL link. *See* Appeal at 14–15 (containing an agenda for the Workshop listing numerous presentations by non-governmental attendees).

Exemption 5 generally does not exempt information shared between an agency and outside parties from disclosure. *Levy v. USPS*, 567 F.Supp.2d 162, 167 (D.D.C. 2008) (holding that "correspondence with an outside party and [records] that have either been disclosed to individuals outside the agency or were created by third parties and provided to the agency [] do not fall within the ambit of the deliberative process privilege."). OPI has not brought forth any information showing that E-mail 2 and its contents are inter-agency or intra-agency records to which Exemption 5 applies. Accordingly, we conclude that E-mail 2 is not an inter-agency or intra-agency record under Exemption 5, and we will grant Appellant's Appeal.

### **C. Segregability of the Contents of the Presentations**

Having concluded that E-mail 2 is not an inter-agency or intra-agency record under Exemption 5, and in light of our decision to remand this matter to OPI for a new determination, we need not address the segregability of the contents of the presentations at this time.

## **III. Order**

It is hereby ordered that the appeal filed by Ms. Allison Kole on behalf of Essential Information, Inc. on May 21, 2019, No. FIA-19-0017, is granted in part. This matter is hereby remanded to OPI, which shall issue a new determination in accordance with the above Decision.

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.

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 the right to pursue litigation. OGIS may be contacted 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](http://ogis.archives.gov) Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
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