

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

In the Matter of Jimmy Tobias

Filing Date: May 19, 2023

Case No.: FIA-23-0018

Issued: June 5, 2023

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**Decision and Order**

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On May 19, 2023, Jimmy Tobias (Appellant) of MuckRock News appealed a final determination letter (Final Determination Letter) issued by the Department of Energy's (DOE) Office of Public Information (OPI), dated April 28, 2023. The Final Determination Letter responded to Request No. HQ-2023-00642-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by DOE in 10 C.F.R. Part 1004. The Final Determination Letter informed the Appellant that no responsive documents were found. The Appellant challenges the adequacy of the search. In this Decision, we deny the appeal.

**I. Background**

On February 28, 2023, the Appellant submitted a FOIA request to DOE, seeking the following information:

“[a]ny and all records, including email communications, scientific papers and materials, underlying documentation, memos, briefings, etc[.], that are related in any way to the intelligence report on the origin of COVID-19 that the Department of Energy recently presented to the White House and members of Congress. This request also seeks a full copy of the intelligence report itself.”

FOIA Request from Jimmy Tobias at 1 (February 28, 2023).

The Appellant also requested expedited processing. OPI sent the request to DOE's Office of Intelligence and Counterintelligence (IN) to conduct a search for responsive documents. Determination Letter from Alexander C. Morris to Jimmy Tobias at 1 (April 28, 2023). On April 28, 2023, OPI notified the Appellant that no responsive records were located. *Id.* As stated above, the Appellant filed a timely appeal on May 19, 2023.

In his appeal, the Appellant indicated that DOE failed to conduct an adequate search for responsive documents and further argued that the search was improperly restricted to IN documents. Appeal Letter Email from Jimmy Tobias to OHA Filings at 1 (May 19, 2023). The Appellant stated that his request pertained to “records anywhere in the possession of the DOE in its entirety.” *Id.* The

Appellant went on to suggest that at minimum, “the Office of the Secretary, the Office of Science and any other offices that might reasonably have participated in the report that was the subject of the Wall Street Journal news coverage” should be searched for responsive documents. *Id.*

## II. Analysis

In responding to a request for information filed under FOIA, it is well established that 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. “The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Jennings v. Dep’t of Justice*, 230 F. App’x 1, 1 (D.C. Cir. 2007) (internal quotation marks omitted). Whether the search conducted was reasonable depends on the facts of each case, and if it is evident that the search conducted was in fact inadequate, we do not hesitate to remand a case. *See, e.g., In the Matter of Ayyakkannu Manivannan*, Case No. FIA-17-0035 (2017); *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 497 (D.D.C. 2017) (citing *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

As an initial matter, despite what was reported in various media outlets, IN informed OHA that the report that the Appellant is seeking regarding the origin of COVID-19 was not, in fact, authored by DOE. Memorandum of Telephone Conversation between OHA and Lauren Gatling at 1 (May 23, 2023).

In our review of the present case, we requested that OPI provide the search certificate that was completed following the search that was conducted in this matter. The search certificate, which was signed by the IN FOIA manager on April 28, 2023, indicates that IN conducted a manual and automated search in March 2023 of staff records, email accounts, archived email accounts, and archived onsite records holdings. FOIA Search Certification Form at 1–2 (April 28, 2023). The certificate contains a note that “DOE did not create the report/brief on the topic mentioned in the request.” *Id.* at 1.

To gain further clarification and information regarding the search certificate, OHA reached out to IN. The IN Subject Matter Expert (SME) indicated that she “notified the employees that [were] directly involved in [COVID] analysis . . . that they need to begin searching their personal files (i.e., emails and files located on the shared drive).” Attachment to Email from Lauren Gatling to OHA at 1 (May 24, 2023). At that time, she confirmed with “DOE-IN leadership and the same employees” that DOE did not create any such report. *Id.* The SME then organized a search of the Headquarters and Laboratory (HAL) network in which classified information is stored. *Id.* Information of a classified nature would only be kept in the HAL network. *Id.* The SME indicated that the entirety of the HAL network for all employees with a HAL email account, which included archived email accounts, was searched dating as far back as October 19, 2019, using forty different search terms. *Id.* at 1–2. These search terms included “pandemic,” “COVID,” “Wuhan,” “outbreak,” and “origins of the disease.” *Id.* The search yielded 40,000 results, which were then assessed for responsiveness. *Id.* at 1.

Following the search of the entire HAL network email exchange, and with some input from DOE General Counsel, the search was narrowed to DOE-IN employees and leadership “directly involved in COVID-related intelligence analysis.” *Id.* This list was comprised of eight individuals, and the same forty search terms were used to complete the search of their email accounts. *Id.* Searching these eight “email accounts also provided . . . communication exchanges with lab employees involved in the topic.” *Id.* The SME also searched Energy Center, which is the “website for published intelligence production.” *Id.* at 2. Energy Center is a “dissemination platform for the external members of the intelligence community” so that they may access and view the intelligence products published by DOE-IN. *Id.* Lastly, the SME explained that no search was conducted for any physical files, as all intelligence information pertaining to COVID-19 is maintained electronically. *Id.* As indicated in the Final Determination Letter, no responsive documents were found following the aforementioned searches.

OPI also explained that the request specifically asked for an intelligence report and information pertaining to the report. Email from Chidinma Nwosu to OHA at 1 (May 25, 2023). Such records are “ordinarily in the domain of [IN] and any search for responsive doc[uments] in that that office, if it involves the secretary, will turn up in that search.” *Id.* OPI further explained that when a request does not specifically state an office to be searched, OPI may “ask the program offices directly to identify” the “office [that] may have responsive documents.” *Id.* As indicated above, the Appellant argues that other offices, like the Office of the Secretary, should have been searched as well. Appeal Letter Email at 1. However, the DOE need not search exhaustively; it only needs to “show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57 (D.C. Cir.1990). As intelligence reports and any information pertaining to them would customarily be maintained by IN, even if other offices came into possession of the information in question, OPI’s failure to search other offices would not lead to any deficiency in the search that was conducted.

Our review of the search shows IN “conduct[ed] a search reasonably calculated to uncover all relevant documents.” *Truitt*, 897 F.2d at 542. Given that IN conducted a search for responsive documents in the electronic systems where documents of confidential or sensitive nature such as intelligence reports are usually maintained and kept, and that the Appellant requested documents pertaining to a report that IN determined was not authored by DOE, we find that the search was reasonable and used appropriate methods.

### **III. Order**

It is hereby ordered that the Appeal filed on May 19, 2023, by Jimmy Tobias, Case File No. FIA-23-0018, is denied in accordance with the explanation provided above.

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. § 522(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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