

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

In the Matter of VP)

Filing Date: April 14, 2023)

Case No.: PAA-23-0001

Issued: May 3, 2023

Decision and Order

On April 14, 2023, VP (Appellant) appealed a final determination letter dated March 31, 2023, issued by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA). The letter responded to Request No. PA 23-00337-PV, a request filed by the Appellant under the Privacy Act, 5 U.S.C. § 552a, as implemented by DOE regulations set forth at Part 1008 of Title 10 of the Code of Federal Regulations. The determination letter explained that NNSA did not find any responsive records when it conducted a search. The Appellant challenges the adequacy of NNSA's search. In this Decision, we deny the appeal.

I. Background

From 2016 to 2020, the Appellant was employed by the contractor operating the DOE's Sandia National Laboratory (SNL). Privacy Act Request Form from VP at 1 (March 7, 2023). On March 7, 2023, Appellant submitted a Privacy Act Information Request form to DOE asking for "[b]ackground check files, anything related to termination in 2020 and denial of access to [Center for Integrated Nanotechnologies (CINT)] in 2022." *Id.* at 2.

The request was sent to NNSA, where the analyst determined that the request was for the Appellant's Personnel Security File (PSF).¹ Email from Paula Vigil to Erin Weinstock (April 21, 2023). A search for records was then submitted to the NNSA Office of Personnel and Facility Clearances and Classification (OPFCC), the custodian of PSFs for NNSA. *Id.* Responding to the request, OPFCC stated that they had searched their system of records and determined that no PSF exists for the Appellant. Memorandum from Manuel D. Camarena to Christina H. Hamblen (March 14, 2023).

NNSA issued a final determination letter to the Appellant on March 31, 2023, indicating that a search had been conducted and no responsive records had been found. Final Determination Letter at 1. The letter also indicated that the Appellant could seek employment related records directly from the NNSA contractor that had employed her. *Id.*

¹ The analyst later confirmed that OPFCC is the only office within NNSA that handles background investigations, and, therefore, would be the only office that could have a system of records related to any background investigation conducted about the Appellant. Email from Paula Vigil to Erin Weinstock (April 25, 2023).

The Appellant timely appealed the determination letter on April 14, 2023. Appeal Letter Email from VP to OHA Filings at 1 (April 14, 2023). In her appeal, the Appellant challenges the adequacy of the search. *Id.* The Appellant argues that NNSA did not use sufficiently expansive terms, nor did they search all appropriate offices. *Id.*

II. Analysis

The Privacy Act states:

Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.

5 U.S.C. § 552a(d)(1); *see also* 10 C.F.R. § 1008.8.

An agency's search obligations "are dictated by whether the scope of the search is reasonably calculated to uncover all relevant documents." *Mobley v. CIA*, 924 F. Supp. 2d 24, 44 (D.D.C. 2013). Further, "agencies are under no obligation to create or generate records in the course of discharging their obligations under FOIA and the Privacy Act." *Schoenman v. FBI*, 764 F. Supp. 2d 40, 48 (D.D.C. 2011).

Here, NNSA conducted a search of its own records that was reasonably calculated to uncover any documents related to the Appellant's request. On the issue of records related to any background check of the Appellant, the NNSA analyst stated that in her experience working at NNSA, she has only ever seen OPFCC handle background investigations, and she knows of no other NNSA offices that would have information about a background investigation. Email from Paula Vigil to Erin Weinstock (April 25, 2023). NNSA has shown that a search of OPFCC's system of records was completed in response to the Appellant's request and that that was the only reasonable office to seek that sort of information from. Further, our regulations require that requests for information under the Privacy Act "[s]pecify, if possible, the title and identifying number of the system of records as listed in DOE's published notices of system of records" and "[p]rovide if possible any additional information to aid DOE in responding to the request." 10 C.F.R. § 1008.6(b)(4), (5). The Individual did not identify any specific offices or systems of records that she felt should have been searched in response to her request as required by 10 C.F.R. § 1008.6(b)(4), (5). Nor did she provide any indication of why she felt NNSA's search terms were insufficient and what additional search terms would be necessary to complete a reasonable search. Thus, NNSA conducted a reasonably calculated search based on the request.

As to the information about her termination and denial of access, the NNSA analyst explained that it is her understanding that employment records related to contract employees, including those associated with termination or denial of access, are not considered agency records. Email from

Paula Vigil to Erin Weinstock (April 24, 2023). She specifically noted that “[i]f an employee works for a sub-contractor, like CINT, those records are 3rd party records and maintained by that contractor. And so the employee must go to that 3rd party contractor for their HR records.” Email from Paula Vigil to Erin Weinstock (April 27, 2023). The contractor’s prime contract confirms that employment-related records are owned by the contractor rather than DOE or NNSA. *See* <https://www.energy.gov/nnsa/articles/snl-de-na0003525-contract> (June 23, 2016) at I-20(b)(1). Because NNSA established that it would not possess in a DOE system of records any records related to the Appellant’s employment with the contractor, NNSA fulfilled its search responsibilities under the Privacy Act.

Accordingly, we find that NNSA’s search was reasonably calculated to uncover any relevant documents in its possession.

III. Order

It is hereby ordered that the appeal filed on April 14, 2023, by VP, PAA-23-0001, is denied.

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. § 552a(g)(1)(B) as limited by 5 U.S.C. § 552a(g)(5). 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 record seekers 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
Email: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals