

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

In the Matter of John Kennedy )

Filing Date: July 3, 2025 )

Case No.: FIA-25-0044

Issued: July 30, 2025

**Decision and Order**

John Kennedy (Appellant) appeals a final determination letter issued to him from the Department of Energy’s (DOE) Carlsbad Field Office (CBFO), concerning Freedom of Information Act (FOIA) Request No. CBFO-2025-01994-F (Request), filed under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In the final determination letter, CBFO informed Appellant that it conducted its search and, to portions of Appellant’s Request, found no responsive documents. Determination Letter from CBFO to Appellant at 1 (May 20, 2025) (Determination Letter). With respect to the portions of the Request for which CBFO found no responsive records, Appellant challenges the adequacy of the search conducted by CBFO. Appeal Brief from Appellant to Office of Hearings and Appeals (OHA) at 1–4 (July 1, 2025) (Appeal Brief).<sup>1</sup> In this Decision, we deny the Appeal.

**I. Background**

On January 21, 2025, Appellant filed his FOIA Request; relevant for the purposes of this Appeal are eight items requested by Appellant:

- (1) A “[c]opy of the email from John Kennedy (Nuclear Waste Partnership (NWP))<sup>[2]</sup> [Environmental, Safety, and Health] Deputy Manager) to Joe Lopez (CBFO Employee Concerns Manager) documenting Myles Hall (CBFO legal counsel) notifying Brett Babb (NWP legal counsel) that John Kennedy had contacted Myles Hall with concerns regarding Brett Babb’s involvement in blocking a Stop Work” (Item 1);

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<sup>1</sup> While OHA received the Appeal Brief on July 1, 2025, a complete appeal must include “[a] copy of the letter containing the determination which is being appealed . . .” 10 C.F.R. § 1004.8(b). Appellant did not provide a copy of the Determination Letter until July 3, 2025, and OHA thus considers the Appeal filed on July 3, 2025. *See* Email from Appellant to OHA (July 3, 2025).

<sup>2</sup> For context, “DOE/CBFO is the owner of the [Waste Isolation Pilot Plant (WIPP)] Site and [Salado Isolation Mining Contractors (SIMCO)] is the current Managing and Operating (M&O) contractor. [Nuclear Waste Partnership (NWP)] and [Washington TRU Solutions (WTS)] are former M&O contractors.” *See* Email from CBFO to OHA (July 16, 2025).

- (2) A “[l]ist of all the electrical code violations found by the Electrical Safety Authority Having Jurisdiction (AHJ) after the pump house was accepted” (Item 2);
- (3) A “[c]opy of the contract awarded to rework electrical systems in the pump house to make them code compliant” (Item 3);
- (4) A “[c]opy of determination by the CBFO Contracting Officer as to who paid for the pump house rework” (Item 4);
- (5) The “CBFO letter delegating authority having jurisdiction for electrical safety at WIPP to the Electrical Safety Committee” (Item 5);
- (6) A “[l]ist of the WIPP Electrical Safety Committee members and their qualifications from December 2022” (Item 6);
- (7) A “[c]opy of the rescission document issued by CBFO to the Electrical Safety Committee” (Item 7); and
- (8) A “[l]ist of issue notices with a brief description for all electrical safety issues identified during the past three years. For issues that identify multiple deficiencies (For example, fire loop.) [sic] include a list of those deficiencies” (Item 8).

Determination Letter at 1–2. In the Determination Letter, CBFO informed Appellant that it had conducted a search for the above eight items and that it could not locate any responsive records. *Id.*

In Appellant’s July 1, 2025, Appeal Brief, Appellant appears to challenge the adequacy of the search conducted. Appeal Brief at 1 (“The CBFO FOIA office demonstrated an unwillingness to locate the documents I requested . . .”). With respect to Item 1, Appellant recounts having been involved in the email exchange and thus concludes the email record must exist. *Id.* at 1–2. Appellant also asserts, generally, that there are legal requirements that CBFO maintain certain records and concludes the records must thus exist. *Id.* at 2–3.

OHA contacted CBFO to inquire about the search methodology employed when determining that it could not locate responsive records. *See* Email from OHA to CBFO (July 7, 2025). CBFO provided three written responses to OHA on July 16, July 24, and July 28, 2025. *See* Email from CBFO to OHA (July 16, 2025); Email from CBFO to OHA (July 24, 2025); Email from CBFO to OHA (July 28, 2025). The following was provided with respect to each Item.

**a. Item 1**

Appellant requested a “[c]opy of the email from John Kennedy . . . to Joe Lopez . . . documenting Myles Hall . . . notifying Brett Babb . . . that John Kennedy had contacted Myles Hall with concerns regarding Brett Babb’s involvement in blocking a Stop Work.” Determination Letter at 1. With respect to the specific email requested, CBFO contacted its Information Technology (IT)

Department to conduct a search in Microsoft Outlook. Email from CBFO to OHA (July 24, 2025). The IT Department ran the following search parameters using an eDiscovery tool: (“stop work”) AND (SenderAuthor=john.kennedy@wipp.ws OR SenderAuthor=john.kennedy@wipp.doe.gov OR SenderAuthor=john.kennedy@wipp.doe.gov).<sup>3</sup> *Id.* A review of the electronic search resulted in no responsive records being located. *Id.*

**b. Item 2**

Appellant requested a “[l]ist of all the electrical code violations found by the Electrical Safety Authority Having Jurisdiction (AHJ) after the pump house was accepted.” Determination Letter at 1. CBFO reviewed Appellant’s Request and determined that the following individuals would be the likely custodians of any responsive records: (i) Drew McAvoy, Electrical Engineering Manager of the Engineering Department; (ii) Christopher O’Berry, Infrastructure Projects Manager of the Minor Construction Projects; (iii) Joe Nicholas, Operations Safety Manager for the Environmental, Safety, and Health Department; and (iv) Richard Baber, Electrical Safety Professional of the Environmental, Safety, and Health Department. Email from CBFO to OHA (July 16, 2025). CBFO provided the following explaining why these individuals would be likely custodians and why, after reviewing the request, each of them determined the requested record would not exist:

Mr. McAvoy was the Electrical Engineering Manager then and is currently. As part of the Minor Construction Projects group Mr. O’Berry oversees subcontracts and contract work under the Capital Asset Projects organization across the WIPP Site such as the construction of the new pumphouse. While Mr. O’Berry was not the manager over the pumphouse at the time, he does retain all records associated with the project. Finally, Mr. Nicholas and Mr. Baber are Safety Professionals who were on the Electrical Safety Committee that reviewed the electrical work completed at the new pumphouse.

...

The above custodians all made the determination that no records exist based on their review of the pumphouse work as part of their job responsibilities and involvement in the construction of the pumphouse at the time or their retention of associated records thereafter. Further, *the request would require the agency to create and compile a list of the electrical code violations, which is not a record that is kept in the normal course of business.*

*Id.* (emphasis added).

**c. Item 3**

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<sup>3</sup> That the query uses the “OR SenderAuthor=john.kennedy@wipp.doe.gov” search connector twice amounts to harmless error, as CBFO confirmed there were only two email addresses for Mr. Kennedy and the duplicative connector would not change the search results.

Appellant requested a “[c]opy of the contract awarded to rework electrical systems in the pump house to make them code compliant.” Determination Letter at 1. Upon review, CBFO determined that the document titled “Partial Turnover of 490” was responsive and had previously been provided to Appellant with the original Determination Letter. Email from CBFO to OHA (July 16, 2025); *see also* Determination Letter at 1 (“Responsive record ‘Partial Turnover of 490 attached.’”). Accordingly, CBFO no longer maintains that there are no responsive records.

**d. Item 4**

Appellant requested a “[c]opy of determination by the CBFO Contracting Officer as to who paid for the pump house rework.” Determination Letter at 1. CBFO determined that Martha Gonzales, Acquisition Services Manager of the Procurement and Acquisition Department, would be the likely custodian of any responsive records given that “Ms. Gonzales manages the acquisitions and procurement program which oversees all subcontracts . . . for subcontractors, vendors, supplies, and other third-party services.” Email from CBFO to OHA (July 16, 2025). CBFO further explained that “Ms. Gonzales’s team is involved with contracts for services and materials from inception to final closing.” *Id.*

CBFO determined that responsive records, if any existed, would be in the form of electronic communications between CBFO and the M&O contractor, SIMCO. *Id.* Such correspondence is stored in an electronic network folder, as well as the email accounts of Ms. Gonzales and relevant subordinates. *Id.* Using the relevant Purchase Order number, Ms. Gonzales and her subordinates conducted an electronic search of the aforementioned repositories. Email from CBFO to OHA (July 28, 2025). No responsive records were found. *Id.*

CBFO further explained that “because contract closeout for the work had not yet been completed[,] there would not be a determination by the Contracting Officer on who would be responsible for payment to date . . . .” Email from CBFO to OHA (July 16, 2025). CBFO gave further context for why such a document would not yet exist:

Once all work is complete on a subcontract, prior to closeout, the Contractor (SIMCO) will determine if there are any questioned costs, settlements, claims, etc., that must be finalized prior to closeout. As rework can be an allowable cost, in conjunction with all remaining final invoices, claims, etc., a final determination is not made until closeout.

Email from CBFO to OHA (July 28, 2025).

**e. Item 5 and Item 7**

Appellant requested (i) the “CBFO letter delegating authority having jurisdiction for electrical safety at WIPP to the Electrical Safety Committee” and (ii) a “[c]opy of the rescission document issued by CBFO to the Electrical Safety Committee.” Determination Letter at 1. CBFO determined that, if such documents or correspondence existed, CBFO’s Office of the Manager would have

generated them. Email from CBFO to OHA (July 24, 2025). CBFO explained the following with regards to how such records are stored:

Correspondence generated by CBFO is logged in the CBFO Correspondence Log. Up until 2022 all CBFO correspondence was captured and maintained in the CBFO Mail and Records Center Database (D2) as active records. Once records became inactive, the records were transferred to the WIPP Records Archive Electronic Records Management System (Documentum). Additionally, if correspondence was part of a contract file (included the Contracting Officer) it was maintained in the contract file.

*Id.* Accordingly, the WIPP Records Archive Electronic Records Management System (Documentum), CBFO Correspondence Log (2012-2024), CBFO Mail and Records Center Database (D2), and NWP and WTS contract files were all searched. Email from CBFO to OHA (July 16, 2025). With respect to Item 5, the keywords searched were “electrical safety committee”; “authority having jurisdiction”; and “electrical safety”—each term having been searched separately, so that the search would have yielded all records containing any one of these terms. *Id.*; *see also* Email from CBFO to OHA (July 24, 2025). With respect to Item 7, the keywords searched were “electrical safety committee” and “recission”—again, each term having been searched separately. Email from CBFO to OHA (July 16, 2025); *see also* Email from CBFO to OHA (July 24, 2025). For both Item 5 and Item 7, no responsive records were found. Email from CBFO to OHA (July 16, 2025).

**f. Item 6**

Appellant requested a “[l]ist of the WIPP Electrical Safety Committee members and their qualifications from December 2022.” Determination Letter at 1. CBFO determined that (i) Joe Nicholas, Operations Safety Manager of the Environmental, Safety, and Health Department and (ii) Richard Baber, Electrical Safety Professional of the Environmental, Safety, and Health Department, would be the likely custodians of any responsive records, since they are “[s]afety [p]rofessionals who were on the Electrical Safety Committee . . . .” Email from CBFO to OHA (July 16, 2025). Based on information from the Electrical Safety Committee, CBFO determined that Appellant’s “request would require the agency to create and compile a list of the Electrical Safety Committee members and their qualifications, which is not a record that is kept in the normal course of business.” *Id.*

**g. Item 8**

Appellant requested a “[l]ist of issue notices with a brief description for all electrical safety issues identified during the past three years” and that “CBFO [f]or issues that identify multiple deficiencies (For example, fire loop.) [sic] include a list of those deficiencies.” Determination Letter at 2. CBFO explained that this type of information is kept in “the Issue Notices management system used by SIMCO” and that David Frederici, “as part of his job” as Contractor Assurance Manager with the Contractor Assurance Department, “is most familiar with the database and system.” Email from CBFO to OHA (July 16, 2025). CBFO represented that “[a] search of the

Issue Notices management database and system was conducted to determine whether a responsive list had been created in the course of business and was maintained.” *Id.* However, “Issue Notices are logged and entered into a database and are organized by owning organization” and Appellant’s “request would require the agency to create and compile a list of all Issue Notices based upon word and date filters.” *Id.* Based on information from the Contractor Assurance Department and upon review of the database, CBFO concluded that Appellant’s requested record is not “kept in the normal course of business.” *Id.*

## II. Analysis

As a preliminary matter, CBFO no longer maintains that no responsive record could be located for Item 3. Determination Letter at 1. Instead, CBFO confirmed that the responsive record, “Partial Turnover of 490[,]” was sent with the Determination Letter. Accordingly, CBFO did in fact produce the record requested by Appellant, and the Appeal is unfounded with respect to Item 3.

Nearly the entirety of the Appeal Brief focuses on the legal obligations of CBFO to maintain certain records. *See* Appeal Brief at 2 (concluding that Item 1’s custodians were not in compliance with record retention policy), 3 (noting that for Item 8 safety issues are legally required to be compiled in a database). However, the FOIA “is only directed at requiring agencies to disclose those ‘agency records’ for which they have chosen to retain possession or control . . . .” *Swick v. United States Dep’t of the Army*, 596 F. Supp. 3d 66, 72 (D.D.C. 2022). It “does not impose a document retention requirement on agencies,” and “[e]ven where the Government was obligated to retain a document and failed to do so, that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse[.]” *Id.* Accordingly, Appellant’s arguments and commentary—for example, his assertion that “[i]t is a bit surprising that CBFO has acknowledged in writing that they aren’t maintaining official documents pertaining to safety”—are misplaced in this FOIA appeal.

Instead, the FOIA requires that, upon receiving a request, a government agency “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 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). In conducting a search, an agency must search in locations where responsive records are likely to be found. *Powell v. IRS*, 280 F. Supp. 3d 155, 162–63 (D.D.C. 2017). An agency is not required to conduct an exhaustive search of each of its record systems; it need only conduct a reasonable search of systems that are likely to uncover responsive records. *Ryan v. FBI*, 113 F. Supp. 3d 356, 362 (D.D.C. 2015) (citing *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The reasonability of the agency’s search depends on the facts of each case. *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 496 (D.D.C. 2017).

Here, for all Items remaining at issue, CBFO identified appropriate possible custodians and repositories based upon the wording of the FOIA Request. With respect to Items 1, 4, 5, and 7, CBFO also used appropriate search terms specifically tailored from the wording of Appellant’s

own Request. In Item 1, Appellant seeks a specific email that Appellant sent to Mr. Lopez regarding “Brett Babb’s involvement blocking a stop work.” Determination Letter at 1. The specific search parameter used by CBFO IT was reasonably calculated to return any potentially responsive documents: (“stop work”) AND (SenderAuthor=john.kennedy@wipp.ws OR SenderAuthor=john.kennedy@wipp.doe.gov OR SenderAuthor=john.kennedy@wipp.doe.gov). Upon review, CBFO found no responsive records. With respect to Item 4 requesting a copy of the determination as to who would pay for certain work, Ms. Gonzales and her subordinates conducted the search using the specific Purchase Order number for the work in question and did not find any responsive documents. Regarding Item 5, the search parameters used—specifically, the keywords “electrical safety committee”; “authority having jurisdiction”; and “electrical safety”—are pulled directly from Appellant’s FOIA Request and were each searched separately. Similarly, for Item 7, the search parameters used—specifically, the keywords “electrical safety committee” and “recission”—are pulled directly from Appellant’s FOIA Request and were each searched separately.

As for Items 2, 6, 8, and 4—CBFO reasonably identified possible custodians based on the wording of the request and who would have subject matter knowledge, and then, for each of these items, those custodians provided reasoning why the requested document would not exist. With respect to Item 2, which requested a project’s list of electrical code violations, the custodians who worked on the project stated that such a list was not kept in the normal course of business and that Appellant’s request would require the agency to create and compile that list. Similarly, with respect to Item 6, which requested a list of committee members and their qualifications, the custodians determined that such a list was not kept in the normal course of business and would require the agency to create and compile that list. With respect to Item 8, CBFO confirmed that this type of information—Issue Notices—were maintained in a database, but the specific list requested by Appellant had not been generated and is not kept in the normal course of business. Instead, Appellant’s request would require the agency to create and compile a list based on filters not used by the agency. Last, regarding Item 4, which requested a determination as to who would pay for specific work, CBFO explained that, based on the typical sequence of events in procurement and contracting, such a document would not have yet been created.

In sum, for each of the Items referenced in the Appeal, CBFO properly identified which custodians were most likely to have responsive documents, if any existed, “include[ing] all [locations] that [were] likely to turn up the information requested.” *Ryan*, 113 F. Supp. 3d at 362 (internal quotations omitted). For Items 1, 4, 5 and 7, CBFO exercised its “discretion to craft a list of search terms” directly pulled from Appellant’s FOIA Request; thus, CBFO had “reasonably tailored” its search parameters “to uncover responsive documents to the FOIA request.” *Coffey*, 249 F. Supp. 3d at 498 (internal quotations omitted) (alterations omitted). With respect to Items 2, 4, 6, and 8, the possible custodians determined that no responsive records existed, and the agency is under no obligation to create records responsive to Appellant’s FOIA Request that are not in existence. *See Forsham v. Harris*, 445 U.S. 169, 186, (1980) (“FOIA imposes no duty on the agency to create records.”); *Nat’l Sec. Counselors v. CIA*, 969 F.3d 406, 409 (D.C. Cir. 2020) (“FOIA . . . only requires disclosure of documents that already exist, not the creation of new records not otherwise in the agency’s possession.”). As noted above, “[t]he 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*, 230 F. App’x at 1 (internal quotation marks omitted). With respect to all Items referenced in Appellant’s FOIA Request, except Item 3 for which the responsive record was located and produced, OHA finds that CBFO has conducted an adequate search reasonably calculated to uncover responsive documents.

### **III. Order**

It is hereby ordered that the appeal filed by John Kennedy, on July 3, 2025, Case No. FIA-25-0044, 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. § 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  
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