United States Department of Energy
Office of Hearings and Appeals

In the Matter of John Kennedy	)	
	)	
Filing Date: May 15, 2026	)	Case No.: FIA-26-0038
	)	
	)	

Issued: June 3, 2026

Decision and Order

John Kennedy (Appellant) appeals a final determination letter issued to him from the Department of Energy (DOE) Office of the Inspector General (OIG), concerning Request No. HQ-2025-01999-F, 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 final determination letter, the OIG informed Appellant that it conducted a search and produced one document from which it made partial redactions pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5). Appellant challenged the OIG's determination. In this Decision, we deny the appeal.

I. Background

a. FOIA Request, Amendments, and OIG's Initial Determination

On January 21, 2025, Appellant filed a FOIA request which was assigned to the DOE OIG for processing. Email from Appellant to FOIA-central@hq.doe.gov (Jan. 21, 2025). The request was for the following:

> Crosswalk from 41 USC4712 to DOE OIG implementing procedures.
> DOE OIG procedure for conducting investigations.
> DOE OIG procedure for auditing investigations.
> DOE OIG procedure for referral of investigations to outside agencies (FBI/DOJ).
> Log of hours billed against my whistleblower case.
> Contact details from the DOGE team lead auditing DOE.

Id. (no alterations). On November 18, 2025, the OIG reached out to Appellant to determine what "documents [Appellant] was seeking." *See* Email from FOIAOIG@hq.doe.gov to Appellant (Nov. 18, 2025). The same day, Appellant sent a return email, mostly repeating the contents of the original FOIA request. *See* Email from Appellant to FOIAOIG@hq.doe.gov (Nov. 18, 2025).

On December 9, 2025, the OIG sent an email asking a singular question: "Just to clarify, are you only seeking the Whistleblower procedures that generate a crosswalk to ensure accurate implementation of the law?" *See* Email from FOIAOIG@hq.doe.gov to Appellant (Dec. 9, 2025). That same day, Appellant sent an email indicating that the "first item I'm looking for is the crosswalk the OIG generated when implementing 41USC4712 [sic] and/or audited 41 USC4712

[sic] implementation" and that "[t]he whistleblower procedures are the second part of my FOIA request." Email from Appellant to FOIAOIG@hq.doe.gov (Dec. 9, 2025) (12/9/25 Email). On February 24, 2026, the OIG issued a response indicating that no responsive documents were found. *See* First Determination Letter (Feb. 24, 2026). In the Determination Letter, the OIG stated that it understood Appellant's 12/9/25 Email to have "clarif[ied]" that his request was "seeking the whistleblower procedures and the crosswalk the OIG generated when implement 41 U.S.C. § 4712 and/or audited 41 U.S.C. § 4712 implementation." *Id.* at 1.

b. Initial FOIA Appeal in FIA-26-0020 and New Determination Letter

On February 26, 2026, Appellant filed an appeal (Initial Appeal) with DOE's Office of Hearings and Appeals (OHA), assigned case number FIA-26-0020. *See* Initial Appeal (Feb. 26, 2026). In the Initial Appeal, Appellant challenged the adequacy of the search. *Id.* at 1 ("The OIG's [ ] response, dated February 24, 2026 . . . is improper, as it reflects an inadequate and unreasonably narrow search . . . ."). On March 5, 2026, OHA dismissed the Appeal as moot given representations from the OIG that it would issue a new determination letter and release a new document relevant to Appellant's request. Dismissal Letter at 1 (Mar. 5, 2026).

On March 10, 2026, the OIG issued a new determination letter indicating the following:

> During the initial search, the OIG identified a draft policy on whistleblower retaliation complaints. The OIG originally determined that the policy was not responsive to the request because it was a draft that was not vetted by legal counsel or approved for use. After further review, the OIG determined that the draft policy was appropriate for release. As a result, the OIG is now releasing to you a supplemental response solely regarding the draft policy on whistleblower retaliation complaints.

Second Determination Letter at 2 (Mar. 10, 2026). The OIG applied Exemption 5 redactions to portions of the released document:

> The information withheld under Exemption 5 consists of portions of a draft policy concerning whistleblower retaliation complaints. This draft has neither undergone legal review nor received formal approval. Because the document reflects preliminary, deliberative views rather than final agency policy, its disclosure would risk misleading the public and impair the integrity of the agency's decision-making process. The OIG has therefore determined that release of this material is not in the public interest and could cause unnecessary confusion by revealing nonfinal, unvetted policy language.

Id.

c. Instant Second Appeal

On May 15, 2026, the Individual filed his instant Second Appeal. Second Appeal (May 15, 2026).[1] The Second Appeal challenges the adequacy of the search because of "[n]ew evidence obtained after [Appellant's] original appeal" that he purports "directly contradicts the OIG's position" that "[n]o records" exist. *Id.* at 2. In particular, he argues that the OIG must have a written procedure for whistleblower investigations because "OIG staff members Matthew Vinyard and Jocelyn Chavez confirmed that the OIG does follow written procedures when conducting whistleblower investigations" according to a "recorded telephone interview [from] April 8, 2026." *Id.*

Appellant also argues that responsive documents must exist based on the following:

> **Referral Procedures Exist:** FBI [Federal Bureau of Investigations] Special Agent Tom Neider initiated an investigation into an apparent attempt by SIMCO/Bechtel to offer me hush money. The DOE blocked Agent Neider's investigation, asserting that the DOE had jurisdiction and would refer the matter to the FBI only "if appropriate." Agent Neider later contacted me directly to explain the DOE's intervention. Under the Inspector General Act, the OIG must "report expeditiously to the Attorney General" any suspected violation of federal criminal law (5 U.S.C. App. § 4(d)). The FBI possesses broad independent authority to investigate federal crimes under 28 C.F.R. § 0.85. No executive agency may unilaterally block or override an FBI investigation absent a formal referral procedure, memorandum of understanding, or interagency agreement. The OIG's assertion that no such referral procedures exist is therefore demonstrably false.

Id. (no alterations). Appellant concludes "that responsive records—investigative procedures, referral protocols, and related documents—plainly exist." *Id.*

With respect to the Exemption 5 redactions applied to the draft policy that he received, Appellant advances three arguments: (1) "The draft is being used in practice (as confirmed by OIG staff during my April 8 interview), rendering it 'working law' rather than purely pre-decisional material"; (2) "OIG has not demonstrated any 'reasonably foreseeable harm' from disclosure, as required by the FOIA Improvement Act of 2016. Generic assertions of 'public confusion' or impairment of decision-making are insufficient"; and (3) "Purely factual material, procedures, and timelines must be segregated and released unless inextricably intertwined with deliberative content." *Id.* at 2–3. He requested a *Vaughn* index justifying each redaction and the release of any segregable information. *Id.* at 3.

d. OIG's Response to Instant Appeal

On May 21, 2026, the OIG sent OHA its Response to the instant Second Appeal. *See* Response to Second Appeal (May 21, 2026) (Response). The OIG provided the following regarding Appellant's argument that OIG staff members told him that OIG has a written policy:

> The OIG reviewed the recording it possesses from its April 8, 2026, interview with Appellant and did not identify any discussion between Appellant and the named

[1] 10 C.F.R. § 1004.8(c) provides that appeals "delivered after the regular business hours of the Office of Hearings and Appeals are considered received on the next regular business day." Accordingly, OHA considers the Second Appeal delivered on May 14, 2026, after 5:00 p.m. to have been filed on May 15, 2026.

> OIG employees regarding written OIG policy. However, even if such conversation did occur outside of the OIG's recording, the OIG FOIA office has coordinated with all relevant individuals who could maintain custody of the requested documents, and the search has returned no results other than the draft policy already provided to Appellant. Further, the Director [of Hotline Operations and Whistleblower Investigations] who the OIG queried about the policy[,] is the supervisor of the OIG employees Appellant [referenced] . . . [and] has confirmed that there is no finalized policy. Based on this information, the OIG contends that it conducted a reasonable and adequate search.

Id. at 3 (emphasis added). Furthermore, to the extent that Appellant requests "referral procedures to the FBI for violations of criminal law based on a conversation Appellant had with a non-OIG employee"—the OIG maintains that it had contacted Appellant to clarify the scope of Appellant's FOIA Request and that Appellant had explicitly requested the following: "[t]he whistleblower procedures are the second part of my FOIA request. The first item I'm looking for is the crosswalk the OIG generated when implementing 41 USC 4712 and/or audited 41 USC 4712 implementation." *Id.* (quoting 12/9/25 Email). Accordingly, OIG argues that it is "inappropriate for Appellant to now try to widen his search parameters on appeal." *Id.* The OIG also cites to *ACLU v. Dep't of Homeland Security* for the proposition that, "[a] reasonable effort to satisfy [a FOIA] request does not entail an obligation to search anew based upon a subsequent clarification . . . ." *See id.* at 3 (quoting Civil Action No. 20-3204, 2023 U.S. Dist. LEXIS 57430, at *31 (D.D.C. Mar. 31, 2023)).

With respect to the Exemption 5 challenges, the OIG first noted that the draft whistleblower investigation policy is clearly a draft where it is marked as such and where it references steps naming "OIG's Office of Inspections, Intelligence Oversight, and Special Projects (OIIS) division as the office responsible for investigating whistleblower complaint" but "in the beginning of 2025, the OIG reorganized and the OIIS division was eliminated" and such "whistleblower investigations fall under the OIG's Office of Investigations." *Id.* at 4. Accordingly, material in the draft policy provides deliberative, and sometimes incorrect, information—not current agency policy. *Id.*

Furthermore, "the OIG's [Second Determination] Letter . . . addressed the reasonably foreseeable harm in releasing the full draft policy stating that if the policy was released in full it would risk misleading the public and impair the integrity of the agency's decision-making process." *Id.* at 4. By way of example, the OIG provided that the draft misstated the Whistleblower Protection Coordinator (WPC)'s role in the whistleblowing process and that release would result in the public confusing WBC's role in the whistleblowing process if such draft were to be released in full and would result in mistrust in the WBC, which is supposed to act as in an "educational and informational" role rather than an evaluative or investigative role. *Id.* The OIG offers that this such misstatement could easily lead to a "mistrust of the WPC" process. *Id.*

The OIG maintains that when reviewing the draft policy it separated "purely factual information from deliberative language." *Id.* Furthermore, OIG argued that it need not produce a *Vaughn* index at this juncture. *Id.*

II. Analysis

a. Adequacy of Search

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).

Appellant raises two bases for challenging the adequacy of the search. Appellant's first argument is that there must exist a final written procedure or policy for investigating whistleblower matters because certain named OIG employees informed him in a "recording" that such written procedures exist. Second Appeal at 1. While this is Appellant's representation, the OIG represented that after reviewing its own recording of that conversation there was no indication that this was ever communicated to him by said employees. Furthermore, even if someone had stated this to him, the OIG Director of Hotline Operations and Whistleblower Investigations has confirmed that there is no final written whistleblower policy. At this point, the search conducted has been plainly reasonable. The OIG consulted the most logical custodian for whistleblower procedures, its Director of Hotline Operations and Whistleblower Investigations, who would have direct knowledge of whether a final written whistleblower investigation procedure exists. *Nat'l Sec. Counselors v. CIA*, 969 F.3d 406, 409 (D.C. Cir. 2020) ("FOIA . . . only requires disclosure of documents that already exist . . . ."). In prior cases, OHA has found searches undertaken adequate when subject matter experts with direct knowledge confirmed that the records described in a FOIA request were never created. *See John Kennedy*, OHA Case No. FIA-24-0044 at 7 (2025) (denying an appeal where "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"); *Jimmy Tobias*, OHA Case. No. FIA-23-0018 at 2 (2023) (denying an appeal where "leadership and [ ] employees [confirmed] that DOE did not create any such report"). Accordingly, it appears that the search for a final written whistleblower investigation procedure or policy was reasonable.

Appellant also challenges the adequacy of the search based on conversations that he had with an FBI employee and concludes "[t]he OIG's assertion that no such referral procedures [to the FBI] exist is therefore demonstrably false." Second Appeal at 2. While this may be relevant to the original FOIA request, Appellant clarified his FOIA Request in his 12/9/25 Email. In response to the OIG's question if he was "only seeking the Whistleblower procedures . . .[,]" Appellant specifically requested: "the crosswalk the OIG generated when implementing 41USC4712 [sic] and/or audited 41 USC4712 [sic] implementation" and "[t]he whistleblower procedures." 12/9/25 Email. After reviewing the correspondence, I find the OIG's interpretation—that the Individual had narrowed his original FOIA request to simply the whistleblower "crosswalk" and "procedures"—to have been reasonable.

To be clear, 41 U.S.C. § 4712 is a whistleblower protection statute with no reference to FBI referrals.[2] It is unclear how Appellant's argument regarding FBI referral procedures relates at all to his 12/9/25 Amended FOIA request for documents or written whistleblower policies and procedures that the OIG implemented in accordance with 41 U.S.C. § 4712. To the extent that Appellant now requests documents *outside* the scope of the FOIA request, the agency "need not expand their searches beyond the four corners of the request, nor are they required to divine a requester's intent." *Am. Chemistry Council, Inc. v. U.S. Dep't of Health and Human Servs.*, 992 F. Supp. 2d 56, 62 (D.D.C. 2013). Furthermore, as the OIG has pointed out, courts have held that agencies need not "search anew based upon a subsequent clarification." *Am. Ctr. For Law & Justice v. U.S. NSA*, 474 F. Supp. 3d 109, 130 (D.D.C. 2020). Appellant's argument regarding the FBI fails to provide a basis for remand based on the adequacy of the search.

b. Exemption 5

Even though a final written procedure does not exist, the OIG thought it appropriate to turn over a draft document relevant to Appellant's request, and Appellant challenges the Exemption 5 redactions made to the document. Exemption 5 of FOIA allows an agency to withhold "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 exemption includes the deliberative-process privilege, which involves records "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). For a document to be withheld under the deliberative process privilege, the information in the document must be both pre-decisional and deliberative. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 150–51 (D.C. Cir. 2006). A document is "pre-decisional" if it is "generated before the adoption of an agency policy." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). In order to be deliberative, a communication must "reflect[] the give-and-take of the consultive process." *Id.* at 866.

Appellant's first argument is that the "draft is being used in practice." Second Appeal at 2. However, as explained in *United States Fish & Wildlife Serv. v. Sierra Club, Inc*., "the deliberative process privilege protects [a] draft . . . at issue" where it "reflect[s] a preliminary view" and "not a final decision . . . ." 592 U.S. 261, 269 (2021). In that case, the Supreme Court made clear that "practical consequences" of a draft are not controlling; instead, it looked to the fact that the draft had been prepared by lower-level staff and the fact that the draft had not been approved by decisionmakers to determine that the draft was pre-decisional and deliberative. *Id.* at 271–72. Here, there are several indicia that this document is pre-decisional and deliberative—rather than some secretly adopted policy. As OIG explained, this document is marked as a "DRAFT"; an OIG division referenced in the draft no longer exists; the draft misstates the role of the WPC; and the draft also lacks review from OIG's legal division and formal approval. Response at 4. The Director

[2] "An employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant." 41 U.S.C. § 4712(a)(1).

himself confirmed there is no formal written policy or procedure. *Id.* at 3. Appellant's first argument thus does not warrant remand.

Appellant next argues that there is no "reasonably foreseeable harm" from disclosure and cites that "[g]eneric assertions of 'public confusion' or impairment of decision-making are insufficient." Second Appeal at 2; *see* 5 U.S.C. § 552(a)(8)(A) (barring withholding unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law"). OIG gave a rather concrete example in its Response: that the draft misstates the role of WPC "would confuse the public into thinking the WPC is an investigator in the whistleblower process" when it is instead "an educational and informational" institution. Response at 4. Such misstatement in turn may lead to mistrust in the WPC and its role. *Id.* Accordingly, Appellant's argument that the OIG's articulation of the foreseeable harm is "general" is unfounded. Appellant's second argument does not warrant remand.

Appellant's third argument is that purely factual material must be segregated and released unless so intertwined with deliberative content. Second Appeal at 3. Purely factual material must typically be released in otherwise deliberative documents. *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1149 (9th Cir. 2008). However, the selection of factual material may sometimes itself be a deliberative process that is privileged. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974) ("The work of the assistants in separating the wheat from the chaff is surely just as much part of the deliberative process . . . ."). The OIG pointed out that it had released the entirety of the first 6 pages of the draft, as it only "consisted of statutory authorities, definitions, and other background information." Response at 4. The OIG indicated that it redacted the "draft . . . procedures." *Id.* OHA has reviewed the redacted and unredacted versions of the draft document and is satisfied that the content falls within the deliberative process privilege. For example, on the redacted version of the draft, OIG released headings on pages 7 and 8, clearly demonstrating that the redacted text is about draft procedures OIG has not adopted: "Initial Complaint Intake and Inquiry" and "Referral to Final Disposition." Redacted Document at 7–8. Appellant's third argument does not warrant remand.

Last, Appellant requests a *Vaughn* index. Second Appeal at 3. Such an index is not a legal requirement under FOIA, and it is not mandatory that DOE provide one in response to a FOIA request. *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (stating that there "is no requirement that an agency provide a 'search certificate' or a 'Vaughn' index on an initial request for documents" and that "[t]he requirement for detailed declarations and *Vaughn* indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court"). Furthermore, OHA has previously held that *Vaughn* indices are only required during litigation and are not required to be provided as part of an administrative appeal of a FOIA request. *Advocates for the West*, OHA Case No. FIA-23-0001 at 8 (November 21, 2022) (finding that "[OHA] precedent, and that of the federal courts, makes it clear that agencies are not required to produce a *Vaughn* index until a requestor has exhausted the administrative process."). Accordingly, remand is not warranted based upon this request.

As outlined above, Appellant has advanced no argument with respect to the adequacy of the search and the Exemption 5 redactions that warrants remand. The Appeal is denied.

III. Order

It is hereby ordered that the appeal filed by John Kennedy on May 15, 2026, Case No. FIA-26-0038, 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.

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National Archives and Records Administration
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