

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

In the Matter of:	Joseph Ercole)	
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Filing Date:	November 12, 2014)	Case No.: FIA-14-0078
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Issued: November 21, 2014

Decision and Order

On November 12, 2014, Joseph Ercole (the Appellant) appealed a determination that he received from the Department of Energy (DOE) Office of Science Chicago Office (CH) on September 29, 2014, in response to a request for documents (FOIA # CH-2014-00037-F) that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.¹ In the determination, CH identified and released various responsive documents, withholding portions of some documents pursuant to FOIA Exemption 6. In his appeal, the Appellant challenges the adequacy of CH’s search for documents with respect to a portion of his FOIA request.

I. Background

The Appellant, a veteran, requested information pertaining to a job vacancy announcement for which he applied and was not selected. Specifically, the Appellant requested nineteen types of documents pertaining to “Job Vacancy Announcement #DOE-CH-14-002-MP, GS-1102-13, Contract Specialist at Upton, NY.” Letter from Miriam R. Bartos, FOIA Officer, CH, to Joseph Ercole (September 29, 2014) (Determination Letter). In its determination, in which CH responded to each of the Appellant’s nineteen categories of requested information, CH identified various documents responsive to several of the categories of requested information, and released the documents to the Appellant in their entirety or with portions withheld pursuant to FOIA Exemption 6. For the remaining categories of information, CH indicated that it located no responsive documents. *Id.* at 4-8. Pertinent to this Appeal, among the categories of information for which no responsive documents were located was the following: “reasons, submitted by the selecting official/appointing authority, in support of a proposed pass over of a preference eligible ([the Appellant]).” *Id.* at 7-8.

¹ In his request, the Appellant sought information about himself and other individuals. As a result, CH processed the request as a third-party request under the FOIA and as a first-party request under the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008. CH released the first-party information in its entirety to the Appellant. Therefore, CH’s processing of the request under the Privacy Act is outside the scope of this Appeal.

After receiving the Determination Letter and the accompanying released documents, the Appellant filed the instant Appeal with the DOE Office of Hearings and Appeals (OHA). Letter from Joseph Ercole to OHA (dated October 29, 2014) (Appeal). In his Appeal, the Appellant challenged CH's determination that there existed no documents responsive to his request for the selection official's reasons supporting a "pass over" of a preference eligible.² *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures 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., Project on Government Oversight*, Case No. TFA-0489 (2011).³

In response to our inquiry in this case, CH informed us that, in response to the Appellant's FOIA request, CH's Human Resources (CH-HR) organization searched the entire file for job announcement #DOE-CH-14-002-MP for documents responsive to the request. With respect to the Appellant's request for documents related to the "pass over" of a preference eligible, CH-HR located no responsive documents in the file. Email from Miriam R. Bartos, FOIA Officer, CH, to Diane DeMoura, Attorney-Advisor, OHA (November 17, 2014). In addition, CH-HR informed us that no responsive documents should exist because the Appellant was not passed over during the selection process. According to CH-HR, "this was a merit staffing action, [and the Appellant] was referred [to the Selection Official] as a Best Qualified candidate. He was not passed over, as veterans['] preference is not applicable in merit staffing." *Id.* Therefore, the documents that the Appellant seeks do not exist.

The FOIA pertains to those documents in an agency's possession at the time of a request. The statute does not require an agency to compile or create records for the purposes of satisfying a FOIA request. 5 U.S.C. § 552; 10 C.F.R. § 1004.4(d). *See also Cause of Action*, Case No. FIA-13-0015 (2013); *Tarek Farag*, Case No. TFA-0365 (2010). Consequently, given CH-HR's statement regarding the non-existence of documents responsive to the Appellant's request for records pertaining to the "pass over" of preference eligibles during the selection process for job announcement #DOE-CH-14-002-MP, we will deny the instant Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed on November 12, 2014, by Joseph Ercole, OHA Case No. FIA-14-0078, is hereby denied.

² The Appellant did not challenge any other portion of CH's determination. Therefore, the remainder of the determination falls outside the scope of this Appeal and will not be considered.

³ Decisions issued by the Office of Hearings and Appeals (OHA) are available on OHA's website located at www.energy.gov/oha.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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 your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 21, 2014