

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

In the Matter of Robert H. Leyse)	
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Filing Date: September 10, 2015)	Case No.: FIA-15-0051
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_____)	

Issued: September 25, 2015

Decision and Order

On September 10, 2015, Mr. Robert H. Leyse (Appellant) filed an Appeal from a determination issued to him by the Idaho Operations Office (IOO) of the Department of Energy (DOE) (Request No. OM-PA-15-073). In that determination, IOO responded to a request for information filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require an additional search for responsive documents.

I. Background

On July 6, 2015, the DOE’s Office of Information Resources (OIR) received a FOIA request from the Appellant seeking all records related to DOE’s plans to ship spent nuclear fuel rods to Idaho National Laboratory (INL). Request from Appellant to DOE dated July 2, 2015. OIR assigned the request to IOO. Memorandum from Alexander Morris, OIR, to Clayton Ogilvie, IOO, dated July 30, 2015.

On August 9, 2015, the Appellant e-mailed a revised request to IOO. *See* E-mail from Appellant to Clayton Ogilvie, IOO dated August 9, 2015 (Revised Request). Prefacing his request, he provided a link to a Nuclear Regulatory Commission (NRC) memorandum describing a DOE project that would involve shipping used nuclear fuel rods from the North Anna Power Station (North Anna), a nuclear power plant in Virginia, to INL. *Id.*; *see also* Memorandum from Chris Allen, NRC, to Anthony Hsia, NRC, dated March 23, 2015 (Allen Memorandum).¹ The Appellant then revised his request as follows:

¹ The Allen Memorandum provides an account of a March 23, 2015, meeting attended by NRC officials as well as DOE officials from the Office of Nuclear Energy. *See id.* During the meeting, DOE officials described the project to NRC officials. *See id.*

Documents that describe the procedures, and the licensing by the NRC [Nuclear Regulatory Commission] of the procedures, for removing 25 “sister rods,” nine with M5 cladding and approximately 14 fuel rods with Zirlo cladding and a variety of fuel rods with Zircaloy-4 cladding from fuel bundles at North Anna and as discussed in the above reference [i.e. link].

Revised Request. On August 19, 2015, IOO issued a determination stating that it did not have any responsive records in its possession and that Battelle Energy Alliance, LLC, the management and operating contractor for INL, had found no responsive documents either. Determination Letter from IOO to Appellant dated August 19, 2015.

On appeal, the Appellant has provided a document posted on the DOE web site that was prepared by the Electric Power Research Institute (EPRI). *See* Appeal from Appellant to the Office of Hearings and Appeals dated September 2, 2015. The document outlines a project by the DOE’s Office of Nuclear Energy, working with EPRI and the DOE’s national laboratories, to remove used fuel rods from North Anna and study them for research purposes. *See* “High Burnup Dry Storage Cask Research and Development Project, Final Test Plan,” EPRI, dated February 27, 2014 (EPRI Plan) at ES-1. In a section titled “Rod Extraction and Shipping,” the document provides some technical details about the process for extracting the rods from North Anna. *Id.* at 3-22, 3-23. The Appellant contends that the EPRI Plan shows that DOE may have additional documents about the fuel rod removal process. *See* Appeal.

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., Ralph Sletager*, Case No. FIA-14-0030 (2014).²

When we contacted IOO regarding its search for responsive documents, IOO informed us that it had been active in discussions about whether INL should receive the fuel rods. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Clayton Ogilvie, IOO, dated September 14, 2015 (Ogilvie Memo). However, IOO told us that it was not involved in discussions regarding the procedures for removing the rods from North Anna and so did not have any responsive documents. *Id.* IOO also consulted with Battelle. *Id.* Battelle officials, likewise, stated that they had not received any information on the rod extraction process. *Id.*; E-mail from Mandi Hong, Battelle, to Clayton Ogilvie, IOO, dated August 13, 2015. Battelle was only engaged in

² OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/office-hearings-and-appeals>.

issues surrounding the possible receipt of the rods. Ogilvie Memo. Accordingly, we have concluded that the search for documents at IOO was adequate.

Nonetheless, the request should also have been referred to the Office of Nuclear Energy (NE) to determine whether NE has responsive documents. As stated above, the Appellant has cited a document on DOE's web site that refers to DOE involvement in the fuel rod project. Moreover, it is clear that NE has documents concerning the selection of the particular rods to be removed. Memorandum of Telephone Conversation between Gregory Krauss, OHA, and Ned Larson, Office of Nuclear Energy, dated September 18, 2015. Given the foregoing, we have concluded that the request should be remanded to OIR with instructions to refer the request to NE for a search for responsive documents.

It Is Therefore Ordered That:

- (1) The Appeal filed on September 10, 2015 by Robert H. Leyse, Case No. FIA-15-0051, is hereby denied in part and remanded in part, as set forth in Paragraph (2) below.
- (2) This matter is hereby remanded in part to the Department of Energy's Office of Information Resources which shall refer the request to the Office of Nuclear Energy in accordance with the instructions set forth in the above Decision.
- (3) 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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Poli. A. Marmolejos
Director
Office of Hearings and Appeals
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