

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

In the Matter of Ayyakkannu Manivannan)
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Filing Date: February 8, 2018) Case Nos.: FIA-18-0012
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Issued: February 12, 2018

Decision and Order

On February 8, 2018, Dr. Ayyakkannu Manivannan (Appellant) appealed a Redetermination Letter issued to him by the Department of Energy's (DOE) National Energy Technology Laboratory (NETL) (Request Nos. HQ-2017-00833-F/NETL-2017-01017). NETL issued the Redetermination Letter as the result of a Decision and Order issued by the DOE's Office of Hearings and Appeals (OHA), *Ayyakkannu Manivannan*, Case No. FIA-17-0049, FIA-17-0050 (2017)¹, pertaining to a Request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In the Redetermination Letter, NETL released responsive documents, but redacted portions of some documents pursuant to Exemption (b)(5) of the FOIA. The Appellant appealed, asserting that NETL improperly redacted information pursuant to Exemption 5 and did not comply with OHA's Decision and Order.

I. Background

The Appellant submitted a FOIA Request on April 4, 2017, seeking several different categories of information. FOIA Request from A. Manivannan (April 4, 2017). Each item of the Request was enumerated. At issue here are enumerated items 12 and 16. Item 12 sought "all communication documents, including phone calls and emails with Centre County officials," and "video/audio tape records pertaining" to an investigation against him. In enumerated item 16, the Appellant requested "information regarding the identity of the person who prepared the 'Notice of [P]roposed [R]emoval.'"

In response to the Request, NETL issued a Determination Letter on October 6, 2017, which the Appellant appealed to our office in *Ayyakkannu Manivannan*, Case No. FIA-17-0035 (2017). In relevant part, we determined that NETL did not perform an adequate search with regard to items

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

12 and 16. We therefore referred the matter back to NETL to conduct an adequate search. *Id.* Following this decision, NETL issued a Redetermination Letter on November 22, 2017, in which it responded to item 12, releasing 66 pages of responsive records and redacting 89 portions pursuant to Exemption 5 of the FOIA. With respect to item 16, NETL released 41 pages of responsive records, redacting 13 portions pursuant to Exemption 5. The Appellant appealed the November 22, 2017, Redetermination in *Ayyakkannu Manivannan*, Case No. FIA-17-0049, FIA-17-0050 (2017) (*Manivannan II* or January 11, 2018, Decision and Order). On January 11, 2018, we granted the appeal in part, determining that NETL had conducted an adequate search, but also concluding that it had improperly redacted certain information pursuant to Exemption 5. Accordingly, we remanded the matter to NETL for further processing.

On February 7, 2018, NETL issued a Redetermination Letter in response to the January 11, 2018, Decision and Order. It released 58 pages of records responsive to item 12 in their entirety. It additionally released the 41 pages of records responsive to item 16, making 9 redactions pursuant to the Exemption 5 deliberative process and attorney-client privileges.²

On February 8, 2018, the Office of Hearings and Appeals (OHA) received the Appellant's challenges to NETL's February 7 Redetermination. FOIA Appeal (February 8, 2018). In the Appeal, the Appellant contends that NETL improperly redacted certain information pursuant to Exemption 5 and failed to comply with OHA's January 11, 2018, Decision and Order. *Id.* The Appellant also appears to be challenging the adequacy of the search, asserting that certain documents are "missing" and "should be released." *Id.*

II. Analysis

A. Adequacy of the Search

At the outset, we note that the Appellant alleges that additional documents, such as a log of phone calls and the name of the individual who prepared the "Notice of Proposed Removal," exist, and NETL is refusing to release them. *Id.* We interpret this argument to challenge the adequacy of NETL's search for responsive records. However, in *Manivannan II*, we already determined that the search conducted by NETL for records responsive to items 12 and 16 was adequate. Accordingly, we will not examine this issue anew. *See Manivannan II* at 3.

B. Compliance with OHA's Decision and Order: Exemption 5

a. Item 12

The Appellant next contends that, with regard to item 12, NETL is not in compliance with the January 11, 2018, Decision and Order as "[a]ll the redacted emails...in the previous response are totally neglected in the current response." FOIA Appeal.

OHA examined the item 12 records that NETL released on February 7, 2018. Initially, we noted that, although NETL initially released 66 pages of records on November 22, 2017, it only released

² Notwithstanding the revised redactions, the 41 pages of documents released to the Appellant on February 7, 2018, were the same 41 documents originally released to the Appellant on November 22, 2017.

58 pages on February 7, 2018. Redetermination (February 7, 2018). However, on closer examination, OHA determined that, with respect to the missing eight pages, the Appellant has already received copies of these documents in the proper redacted or unredacted formats in the November 22, 2017, Redetermination. Four of the missing pages were released on November 22, 2017, in their entirety. Redetermination (November 22, 2017). An additional two pages contained the redacted emails entitled “Draft” (May 11, 2016) and “RE: Subpoena in a Criminal Matter involving a NETL employee” (March 14, 2016), which the Appellant received in the November 22, 2017, Redetermination and which OHA already determined were properly redacted pursuant to Exemption 5. *Id.*; see *Manivannan II* at 6. The remaining two missing pages are duplicative of the pages containing the March 14, 2016, email. Thus, based upon the fact that the Appellant already received the missing 8 pages in the proper format, NETL need not provide duplicative copies.

We turn now to the documents that OHA determined were improperly redacted pursuant to Exemption 5. With the exception of the missing pages described above, NETL released all of the item 12 documents in their entirety. Redetermination (February 7, 2018). In its January 11, 2018, Decision and Order, OHA specifically noted that two emails entitled, “FW: Subpoena” (April 5, 2016) and “FW: A. Manivannan and U.S. DOE-NETL” (June 20, 2016), were improperly redacted pursuant to Exemption 5. See *Manivannan II* at 6. Instead of relying on another exemption to redact these emails, NETL chose to release these emails in their entirety. Redetermination (February 7, 2018). As such, we conclude that NETL has fully complied with the January 11, 2018, Decision and Order with regard to item 12.

b. Item 16

The Appellant further alleges that, with regard to item 16, NETL failed to comply with the January 11, 2018, Decision and Order. FOIA Appeal. He further states “NETL redacted the text, including words, sentences, and paragraphs.” *Id.* Initially, we note that the January 11, 2018, Decision and Order did not universally prohibit NETL from redacting information from the released documentation. It solely determined that there were certain redactions that were not properly made pursuant to exception 5. In fact, OHA determined that seven of the redactions made by NETL were properly made pursuant to the deliberative process privilege. See *Manivannan II* at 7.

We turn now to the four redactions that OHA determined were not properly made pursuant to Exemption 5, which consisted of four emails entitled: “RE: Manivannan Found Guilty on Five Felony Counts” (April 22, 2016 at 6:06 a.m. and at 7:28 a.m.) and “RE: Question” (January 13, 2017 and January 17, 2017). See *Manivannan II* at 7. In examining the documents that NETL released to the Appellant on February 7, 2018, we note that, instead of relying upon another of the FOIA exemptions, NETL chose to release these four emails in their entirety. Redetermination (February 7, 2018). As such, with regard to these four emails, NETL is in compliance with the January 11, 2018, Decision and Order.

In the January 11, 2018, Decision and Order, OHA further determined that there were two emails that were partially improperly redacted pursuant to Exemption 5. See *Manivannan II* at 7. These emails were entitled: “Subject: Question (April 21, 2016 at 10:33 a.m. and January 13, 2017 at 8:12 a.m.). *Id.* OHA stated that with regard to the first email, the first three sentences were improperly redacted as these sentences contained no deliberative process. *Id.* Similarly, OHA

noted that the first and third sentences of the second email were improperly redacted pursuant to the deliberative process privilege. *Id.* Again, in lieu of relying upon another FOIA exemption, NETL chose to release the first three sentences of the first email and the first, second, and third sentences of the second email. Redetermination (February 7, 2018). Accordingly, NETL is in compliance with the January 11, 2018, Decision and Order.

To the extent that the Appellant is claiming that some or all of the redactions made by NETL are improper, we note that NETL has not made any additional redactions to the released documents since the January 11, 2018, Decision and Order. Redetermination (February 7, 2018). As we have already determined that the remaining seven redactions were proper, we will not again address this issue. *See Manivannan II* at 7.

III. Conclusion

For the reasons stated above, we conclude that NETL fully complied with OHA's January 11, 2018, Decision and Order, FIA-17-0049, FIA-17-0050. We therefore deny the appeal.

IV. Order

It is hereby ordered that the Appeal filed on February 7, 2018, by Dr. Ayyakkannu Manivannan, No. FIA-18-0012, 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:

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Telephone: 202-741-5770 Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

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