

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Muira McCammon)
)
Filing Date: November 29, 2018) Case No.: FIA-18-0040
)
_____)

Issued: December 14, 2018

Decision and Order

On November 29, 2018, Kendra Albert, Esq. (Appellant), on behalf of Appellant’s client, Ms. Muira McCammon, appealed a determination letter issued by the United States Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2018-01515-F. In that letter, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations set forth at Part 1004 of Title 10 of the Code of Federal Regulations. OPI’s response indicated that it did not locate any records responsive to the request. Appellant submitted a seven-page appeal (Appeal) challenging the adequacy of OPI’s search. The Appeal, if granted, would require an additional search for responsive records.

I. Background

Appellant’s FOIA request sought “any tweets sent out on Twitter that were deleted or kept in draft form from the Twitter handle @fossilenergygov . . . [and] copies of any e-mails or correspondence regarding the drafting and deletion of these tweets.” Appeal at 4. In its response, OPI indicated that DOE’s Office of Fossil Energy (FE) conducted a search of its files and did not locate any responsive records. *Id.* at 6.

On November 29, 2018, Appellant submitted the Appeal to DOE’s Office of Hearings and Appeals (OHA). Appellant asserted that OPI did not search for draft Tweets¹ or provide any information about the process by which it searched for responsive records, and therefore argued that OPI’s search was inadequate. *Id.* at 2–3.

On November 30, 2018, OPI provided the OHA staff attorney assigned to process the Appeal with a document describing FE’s search for records responsive to Appellant’s FOIA request. FE Search Form (September 5, 2018). The document indicated that FE had manually searched relevant

¹ Appellant concluded that OPI had not searched for draft Tweets based on a letter OPI sent to Appellant on August 24, 2018, acknowledging Appellant’s FOIA request. Appeal at 5. The subject line of that letter indicated that Appellant’s FOIA request concerned “copies of all tweets deleted by [FE],” but did not mention Appellant’s request for Tweets kept in draft form and related correspondence. *Id.*

employees' e-mail accounts using the terms "tweet," "Twitter," and "delete." *Id.* at 1. The document did not indicate the operators used to search for these keywords.²

In reviewing the Appeal, we contacted the manager of FE's Twitter account (Manager), who was FE's Acting Director of Communications as of the date of OPI's response to Appellant's FOIA request, as well as an employee (associate) under the Manager's supervision. The Manager and his associate described the process by which Tweets were approved for publication on FE's Twitter account. Employees under the Manager's supervision drafted language for Tweets outside of the FE Twitter account and then e-mailed the draft language to the Manager as file attachments for his review and approval. The Manager and the associate indicated that FE's Tweets were always drafted outside of FE's Twitter account and that there were no draft Tweets in the drafts folder of FE Twitter account. The Manager stated that he and the three other individuals in FE with access to the FE Twitter account had searched their e-mail accounts for e-mails concerning the deletion of Tweets, and reported that there were none.

II. Analysis

"Under the FOIA, an agency is obliged to make available to the public records that are reasonably described in a written request, if not exempt from disclosure." *Kidder v. FBI*, 517 F. Supp. 2d 17, 23 (D.D.C. 2007); 5 U.S.C. §§ 552(a)(3)(A),(b). "A request reasonably describes records if the agency is able to determine precisely what records are being requested." *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C.Cir.1997) (internal quotation marks and citation omitted).

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." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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*, FIA-14-0030 (2014).³

Appellant's FOIA request sought deleted Tweets, Tweets "kept in draft form from the Twitter handle @fossilenergygov," and "copies of any e-mails or correspondence regarding the drafting and deletion of these [T]weets." Appeal at 4. The Manager reported that FE did not have records of deleted Tweets. As to the second category of records, Tweets kept in draft form, the Manager and associate indicated that FE creates Tweets outside of FE's Twitter account and that thus, there were no Tweets kept in draft form in the drafts folder of the @fossilenergygov Twitter account.

Appellant's request also asks for "copies of any e-mails or correspondence regarding the drafting and deletion of these [T]weets." We understand the words "these Tweets" to refer to Tweets that were sent out from the @fossilenergygov Twitter account and then deleted, and also to Tweets

² Search operators filter the results of text searches. For example, inserting the Boolean operator "and" between search terms narrows results to only those containing all of the search terms.

³ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

drafted and saved on the @fossilenergygov Twitter account. A FOIA request may not compel an agency to conduct a search using particular search terms. *Physicians for Human Rights v. U.S. Dep't. of Def.*, 675 F.Supp. 2d 149, 163–64 (D.D.C. 2009). Instead, an agency must use search terms reasonably calculated to produce responsive records. *Id.* FE searched the e-mail accounts of every person with access to the FE Twitter account for e-mails concerning deleted Tweets using the search terms “tweet,” “Twitter,” and “delete” and found no responsive records. Although FE did not use search terms concerning the drafting of Tweets on the FE Twitter account, FE has explained to us that it drafts all Tweets outside of the FE Twitter account. Since FE does not draft and save Tweets on the @fossilenergygov Twitter account, no e-mails would exist concerning draft Tweets saved as such on the FE Twitter account. OHA has previously held that a reasonable search need not include a search for records known not to exist. *Homesteaders Ass'n of the Pajarito Plateau*, VFA-0355 (1997).

Accordingly, we find that the search conducted by FE for documents responsive to Appellant’s FOIA request was adequate and will thus deny Appellant’s Appeal.

III. Order

It is hereby ordered that the Appeal filed by Appellant on November 29, 2018, No. FIA-18-0040, 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
College Park, MD 20740
Web: archives.gov/ogis
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals