United States Department of Energy
Office of Hearings and Appeals

In the Matter of American Oversight	)	
	)	
Filing Date: March 18, 2019	)	Case No.: FIA-19-0010
	)	
	)	

Issued: April 18, 2019

Decision and Order

On March 18, 2019, American Oversight (Appellant) appealed a determination letter (Determination Letter) issued by the United States Department of Energy's (DOE) Office of Public Information (OPI) concerning Request No. HQ-2018-00271-F. Appellant's request sought communications between DOE officials and twenty private entities concerning a potential rule requiring energy markets to recover costs of relying on coal and nuclear energy plants under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004. OPI provided Appellant with documents previously released in response to another request on November 6, 2018. On December 17, 2018, OPI issued the Determination Letter in which it indicated that it had not located any additional documents responsive to Appellant's request. Appellant asserts that OPI's search was not reasonably calculated to locate all of the requested records. As explained below, we grant the appeal and remand the matter to OPI for a further search.

I. Background

In its FOIA request, Appellant sought communications between DOE officials and twenty private entities "containing any of the following search terms (whether in the body or subject):

(a) Section 205
(b) § 205
(c) Section 206
(d) § 206
(e) 'premature retirements of power plants'
(f) 'shall establish a tariff that provides a just and reasonable rate'
(g) 'essential energy and ancillary reliability services.'"

Determination Letter at 1–2.[1]

1 Appellant's FOIA request originally included the search terms "Section 202(c)" and "§ 202(c)," but Appellant agreed to exclude those terms on November 8, 2018, after receiving the previously released records from DOE. *See* Determination Letter at 2.

Appellant specified in its request that the request included "electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions." FOIA Request HQ-2018-00271-F at 2 (November 16, 2017). Appellant subsequently provided domain names for the twenty private entities to facilitate OPI's search for e-mail records. *See* Determination Letter at 2. On November 6, 2018, OPI provided Appellant with responsive records previously released to another requester.

On November 30, 2018, a representative of OPI sent Appellant an e-mail indicating that OPI had found "a large amount of material" and requested that Appellant agree to waive any e-mail attachments that were publicly available. Appeal Ex. C. Appellant agreed to waive the publicly-available attachments, and requested an estimate of the volume of responsive material. *Id.* OPI estimated that, of the approximately eight hundred pages of records it had located, between two hundred and two hundred fifty pages were not publicly available. *Id.*

On December 17, 2018, OPI issued a determination letter in which it indicated that its search had not identified any responsive documents. Determination Letter at 2. In the Appeal, Appellant asserted that OPI had not conducted an adequate search because OPI had previously indicated that it had located responsive records and because media reporting suggested that DOE officials had communicated with at least some of the entities identified in Appellant's FOIA request concerning the topics addressed in Appellant's search terms. Appeal at 1.

In response to an inquiry from an OHA staff attorney concerning the discrepancy between its estimate of two hundred to two hundred fifty pages of records and its actual disclosure of no records, OPI explained that the keywords Appellant specified appeared only in attachments to e-mails, not in the bodies or subject lines of the e-mails themselves, and that all of the attachments in which the keywords appeared were publicly available documents. Since the e-mails to which the publicly available documents were attached did not contain the keywords specified by Appellant in their bodies or subject lines, and Appellant had waived the attachments, OPI concluded that it had not located any records responsive to Appellant's FOIA request. OPI further indicated that its search was limited to e-mail records, and that OPI deemed it unlikely that the DOE officials communicated with the twenty entities specified in Appellant's FOIA request via text message or other means of communication that OPI could search using Appellant's search terms.

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*, OHA Case No. FIA-14-0030 (2014).

Agencies are obliged to construe FOIA requests liberally. *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*Nation Magazine*). We find OPI's determination that e-mails between DOE officials and the entities specified in Appellant's FOIA request were not responsive to Appellant's FOIA request because the search terms appeared in waived attachments rather than the bodies or subject lines of the e-mails excessively literal, and not in keeping with judicial precedent finding that e-mails and their attachments are a single record under the FOIA. *See Coffey v. Bureau of Land Mgmt.*, 277 F.Supp.3d 1, 8 (D.D.C. 2017) ("To the extent the agency intends to argue that the attachments should be treated as separate 'records' from the emails to which they were attached, the Court rejects this approach."); *see also American Oversight v. GSA*, 311 F.Supp.3d 327, 340 (D.D.C. 2018) (finding "GSA's blinkered literalism, distinguishing emails from email attachments, is at odds with the agency's 'duty to construe a FOIA request liberally.'") (quoting *Nation Magazine*). Because the e-mails in question contained attachments which included the keywords specified by Appellant, we conclude that the e-mails contained the search terms specified by Appellant and that OPI improperly deemed the e-mails unresponsive to Appellant's FOIA request.

Furthermore, by limiting its search to e-mail records, OPI failed to conduct an adequate search. Agencies may not impose unreasonable limitations on the scope of a search. *Truitt*, 897 F.2d at 544–46. Appellant's FOIA request specified numerous forms of communication other than e-mail which it wished for OPI to search. We find that it was unreasonable for OPI to interpret Appellant's request for "all communications" as limited to e-mail communications based solely on OPI's belief that searching other means of communication was unlikely to yield responsive records. Accordingly, we remand this matter to OPI to conduct an appropriate search.

III. Order

It is hereby ordered that the appeal filed by American Oversight on March 18, 2019, No. FIA-19-0010, is granted. This matter is hereby remanded to OPI, which shall issue a new determination in accordance with the above Decision.

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: ogis.archives.gov Email: 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