

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Cause of Action Institute)
)
Filing Date: October 30, 2019) Case No.: RFR-20-0001
)
)
_____)

Issued: November 26, 2019

Decision and Order

On October 30, 2019, Cause of Action Institute (Applicant) submitted an application for modification or rescission (Application) of a Decision and Order issued by the Department of Energy’s (DOE) Office of Hearings and Appeals (OHA) regarding OHA case number FIA-20-0001 (Decision). The Decision denied the Applicant’s appeal of a decision issued by the DOE’s Office of Public Information (OPI) concerning a Freedom of Information Act (FOIA) request. The Application, if granted, would rescind the Decision and remand the matter to OPI for additional processing.

I. Background

The Applicant submitted a FOIA request to the OPI on April 2, 2018, requesting records related to the DOE’s implementation of guidance issued by the National Archives and Records Administration concerning management of electronic messages. Application Exhibit (Ex.) 1 at 5–6. Among other things, the Applicant’s FOIA request sought “[a]ll records reflecting the electronic messaging systems installed on Department of Energy devices, including desktops, laptops, tablets, phones, and other mobile devices.” *Id.* at 6. The OPI responded to the Applicant’s FOIA request on September 25, 2019, and provided responsive records. *Id.* at 15–21. However, the OPI did not provide records reflecting electronic messaging systems installed on DOE devices.

The Applicant appealed the adequacy of the OPI’s search for records reflecting the electronic messaging systems installed on DOE devices on October 3, 2019, noting that other federal agencies had produced such records in response to similar FOIA requests and that electronic mail messages provided as part of the OPI’s response suggested that responsive records existed. *Id.* at 2.¹ On October 24, 2019, the OHA issued the Decision in which it denied the Applicant’s appeal. *Matter of Cause of Action Institute*, OHA Case No. FIA-20-0001 (2019).² With respect to the

¹ Applicant’s appeal challenged other elements of OPI’s response which are not at issue in the Application and therefore are not discussed herein.

² Decisions issued by OHA are available on the OHA web site located at <http://www.energy.gov/oha>.

Applicant's appeal of the adequacy of the OPI's search for records reflecting the electronic messaging systems installed on DOE devices, the Decision stated that:

In responding to [] the request, [DOE's Office of the Chief Information Officer (IM)] conducted a search calculated to uncover applications it manages and supports. Email from Bryan Long, IM-60, to Kristin L. Martin, OHA (Oct. 19, 2019). IM manages and supports all approved DOE messaging systems. Appellant hoped to receive a spreadsheet or list of applications DOE uses, but no such document was uncovered in the search. Knowledgeable officials in IM were not aware of such a document's existence and there is no evidence to indicate that such a document exists and was not released. Accordingly, we cannot find that the search was not reasonably calculated to discover the requested documents.

Decision at 4.

On October 30, 2019, the Applicant submitted the Application seeking modification or rescission of the Decision. Application at 1. The Applicant argued that the Decision construed the scope of its FOIA request too narrowly because the Applicant's FOIA request sought records of electronic messaging services installed on DOE devices and not a "list of applications DOE uses." *Id.* at 1–2. In addition, the Application asserted that the fact that the requested record did not exist as a document at the time of the Applicant's FOIA request did not establish the adequacy of the search for responsive records that existed as data in a DOE database or software program. *Id.* at 2.

II. Analysis

The OHA will grant an application for the modification or rescission of an order if [t]he application demonstrates that it is based on significantly changed circumstances. 10 C.F.R. § 1003.55(b)(1)(i). Significantly changed circumstances include: "(i) [t]he discovery of material facts that were not known" at the time of the underlying proceeding; "(ii) [t]he discovery of a law, rule, regulation, order[,] or decision . . . that was in effect at the time of the [underlying] proceeding . . . and which, if such had been made known to the OHA, would have . . . substantially altered the outcome; or (iii) [t]here has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R. § 1003.55(b)(2)(i)–(iii).

The Application argues that the OHA construed the Applicant's FOIA request too narrowly, and that controlling case law should have led the OHA to conclude that the OPI did not conduct an adequate search for records responsive to its request. Upon review of the IM e-mail cited in the Decision, it is apparent that the search conducted in response to the Applicant's FOIA request was limited to DOE-supported messaging systems and that a search for all messaging systems installed on DOE devices was not conducted. Moreover, the Applicant identified relevant case law supporting its position that the OPI could not limit the search for responsive records to existing lists of DOE-supported messaging systems if databases or other electronic systems contained responsive information that could be exported. Application at 1 (citing *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 778–79, 781–82 (D.D.C. 1993)).

The OHA has previously modified or rescinded decisions based upon incomplete information. *See Matter of California-Arizona-Nevada District Organization Contract Compliance*, OHA Case No. FIA-12-0020 (2012) (rescinding a decision and remanding a FOIA request for further processing where the decision was based upon an incorrect understanding of information redacted pursuant to Exemption 4 of the FOIA). In this case, the Decision was premised upon an incomplete understanding of the scope of the Applicant’s FOIA request. Moreover, the Applicant has identified case law which, had it been applied in the underlying proceeding, would have led the OHA to conclude that the OPI was required to conduct a more robust search for records responsive to the Applicant’s FOIA request. Therefore, we find that the Applicant has identified “material facts that were not known” at the time of the underlying proceeding and a “decision . . . that was in effect at the time of the [underlying] proceeding . . . and which, if such had been made known to the OHA, would have . . . substantially altered the outcome.” 10 C.F.R. § 1003.55(b)(2)(i)–(ii).

III. Order

It is hereby ordered that the Application for Modification or Rescission filed by the Applicant on October 30, 2019, Case No. RFR-20-0001, is granted and the OHA’s decision in Case No. FIA-20-0001 is rescinded. This matter is hereby remanded to the OPI for further processing 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. Judicial review may be sought in the district in which the Applicant resides, or has its principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals