

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

In the Matter of: Ron Walli)
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Filing Date: December 23, 2019) Case No.: FIA-20-0018
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Issued: January 28, 2020

Decision and Order

On January 13, 2020, Ron Walli (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Oak Ridge Office (ORO) regarding Request No. ORO-2020-00070-F. In that determination, ORO responded 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. ORO conducted a search and found no documents responsive to the request. The Appellant challenged the adequacy of ORO’s search. As explained below, we grant Appellant’s appeal in part and remand the matter to ORO.

I. BACKGROUND

On October 7, 2019, the Appellant submitted a FOIA request for the following records:

The release of all information held by DOE and/or UT-Battelle regarding any inquiries and subsequent decisions about a potential violation of the ‘Fairness of Opportunity’ requirement spelled out in the contract for UT-Battelle to manage Oak Ridge National Laboratory for DOE. This action would have taken place on or about Dec[ember] 8, 2016. I am specifically requesting the outcome and rationale if it was decided that UT-Battelle did not violate this requirement.

Determination Letter at 1 (January 10, 2020). The request was forwarded to ORO for processing by the Office of Public Information at DOE Headquarters. *Id.* ORO performed a search, and, on January 10, 2020, issued a Determination Letter to the Appellant stating that it had located no records responsive to the Appellant’s request. *Id.*

On January 13, 2020, the Office of Hearings and Appeals (OHA) received the Appellant’s Appeal, in which the Appellant challenges the adequacy of the search for responsive records and requests that ORO perform an additional search for the requested information. Appeal (Jan. 13, 2020). The Appellant asserts that in a previous Whistleblower case, he submitted email correspondence (“emails”) dated during the covered timeframe of the request, and those emails reflect allegations

concerning UT-Battelle's potential violation of the DOE's Fairness of Opportunity requirement.¹ *Id.* The Appellant asserts that those emails would be responsive records, and therefore, ORO's search, which failed to find any responsive records, is an inadequate search. *Id.*

II. ANALYSIS

The FOIA requires agencies to make publicly available records that are reasonably described in a written request, so long as those records are not exempt from disclosure. *Kidder v. F.B.I.*, 517 F. Supp. 2d 17, 236 (D.D.C. 2007); 5 U.S.C. §§ 552(a)(3)(A), (b). Requesters may appeal the adequacy of the search an agency made in satisfying the request. In these appeals, the factual question raised is "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *SafeCard Servs., Inc. v. Sec. and Exch. Comm'n*, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1201 (1991). *See also Hillier v. Cent. Intelligence Agency*, No. 16-cv-1836 (DLF), 2018 U.S. Dist. LEXIS 155414, at *18 (D.D.C. Sept. 12, 2018) (citing *SafeCard* with approval). In responding to a FOIA request, an agency need not conduct an exhaustive search of each of its record systems; rather, it need only conduct a reasonable search of "all systems 'that are likely to turn up the information requested.'" *Ryan v. FBI*, 113 F. Supp. 3d 356, 362 (D.D.C. 2015) (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The standard of reasonableness depends on the facts of each case. *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 497 (D.D.C. 2017) (citing *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). A lack of responsive records does not necessarily indicate that a search was unreasonable. Indeed, if a "[c]ourt is satisfied with the method of search, it need not dwell on the sheer results." *Conti v. United States Dep't of Homeland Sec.*, 2014 U.S. Dist. LEXIS 42544, at *37 (S.D.N.Y. Mar. 24, 2014).

The OHA has previously found a search to be inadequate where the agency could not confirm what type of search was conducted and how the search was conducted. *Carroll Lash*, OHA Case No. FIA-17-0045 (2017). In addition, the OHA has found that an agency has not demonstrated it conducted an adequate search where the agency's interpretation of the FOIA request is too narrow. *Ayyakkannu Manivannan*, OHA Case No. FIA-17-0038 at 8-9 (2017).

We contacted ORO regarding how it conducted the search for the Appellant's FOIA request. To process the request, ORO identified the individuals at UT-Battelle who it determined were most likely to locate responsive records and requested they conduct a search of their records. Email chain between OHA and ORO (January 22, 2020). UT-Battelle conducted two searches for information. *Id.* Its Office of General Counsel conducted the first search and Michael Paulus, Director for Technology Transfer, conducted the second search.

A. Office of General Counsel's Search

The Office of General Counsel ("OGC") "reviewed its internal files and emails, including those related to Mr. Walli's 708 Whistleblower Complaint, and no responsive records were found that

¹ The Appellant's previous Whistleblower case reflects that the Appellant was a former employee of UT Battelle, LLC ("UT-Battelle"), the management and operations contractor for Oak Ridge National Laboratory (ORNL). *Ronald A Walli*, OHA Case No. WBU-17-0009 at 1-2 (2017).

related to inquires or complaints about potential or actual violations of ‘Fairness of Opportunity.’” *Id.* The FOIA Officer could not confirm what type of search the OGC conducted, nor did the OGC provide a confirmation of how it conducted that search. *Id.* The FOIA officer also stated that although she had requested a search certification form from UT-Battelle, she did not receive search certification forms regarding these searches. *Id.* The search description that was provided to OHA by OGC of “review[ing] its internal files and emails” is vague. Without more information, we have no specific information regarding the search terms the OGC used to conduct the search, nor do we have any indication of the type of “internal files and emails” the OGC searched.

In the instant case, without actual confirmation from OGC of what type of search was conducted and how that search was conducted, we are unable to confirm that it conducted a search reasonably calculated to uncover responsive documents. *See Lash* at 2. (DOE contractor contractually bound to search for records under the FOIA failed to provide information regarding what type of FOIA search it conducted, and was therefore found not to have performed an adequate search). Therefore, we will remand the matter to ORO to determine what type of search OGC conducted and, depending on its findings, to conduct further processing of the Appellant’s FOIA Request.

B. Dr. Michael Paulus’s Search

Dr. Paulus is the Director of Technology Transfer at UT-Battelle, and oversees the Licensing Fairness of Opportunity/Conflict of Interest process. Email chain between OHA and ORO (January 22, 2020). The FOIA Officer stated that Dr. Paulus “performed a search in his files and no responsive records were found that related to inquires or complaints about potential or actual violations of ‘Fairness of Opportunity.’” *Id.* Dr. Paulus also conducted a search in his email “for the phrase ‘Fairness of Opportunity,’ using a date range of November 1, 2016 to January 30, 2017, and no results were found.” *Id.*

Given the description of the search Dr. Paulus conducted for responsive records, we find that his search was reasonably calculated to discover responsive documents. Since Dr. Paulus is the UT-Director responsible for the Fairness of Opportunity program, he was most likely to possess knowledge of the locations where responsive documents may exist. Dr. Paulus searched the files most likely to uncover responsive documents, namely his email files and his physical files. Further, he used a search term “Fairness of Opportunity” that, given the nature of the Appellant’s request, seems likely to have uncovered responsive documents. Consequently, we find that the portion of the search conducted by Dr. Paulus was adequate under the FOIA.

For the reasons stated above, we will grant the present Appeal in part and refer the matter to ORO for further processing related to Appellant’s FOIA request.²

III. ORDER

² With regard to the Appellant’s claim that the emails sent with his appeal indicate that responsive documents must exist, we note that none specifically reference the ‘Fairness of Opportunity’ requirement referenced in his FOIA request. Assuming that the Appellant’s emails relate to the subject matter of his FOIA request, the fact that such documents may have existed does not necessarily indicate that such documents still exist and are in the possession of an agency. *See Campbell v. SSA*, 446 F. App’x 477, 480-81 (3d Cir. 2011) (noting that absence of particular documents, which plaintiff claims should be among responsive records, does not establish that agency’s search was not reasonable).

It is hereby ordered that the Appeal filed on January 13, 2020, by Ron Walli, Case No. FIA-20-0018, is granted. In part and denied in all other respects.

This matter is hereby referred to the Department of Energy's (DOE) Oak Ridge Office (ORO), which shall issue a new determination in accordance with the instructions set forth in 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 one's 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: <https://www.archives.gov/ogis> Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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