

April 29, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Judicial Watch, Inc.

Date of Filing: March 18, 2003

Case Number: TFA-0025

On March 18, 2003, Judicial Watch, Inc. (the Appellant), filed an Appeal from a final determination that the Freedom of Information/Privacy Act Group (FOI/PA) of the Department of Energy (DOE) issued on February 5, 2003. That determination concerned a request for information submitted by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, FOI/PA would be required to conduct a further search for responsive documents.

Background

On August 1, 2000, the Appellant submitted a FOIA request for all documents that refer to

Agreements(s), contracts(s), concession(s), compensation(s), loan(s), guarantee(s), assistance, cooperation, consideration, lease(s), transfer(s), sale(s), aid, support, inducement(s), influence, reward(s), stimulus(i), solicitation(s), benefit(s), gift(s), gratuity(ies), remuneration, and/or promise(s), made or entered into since September 11, 2001, with the governments of:

Egypt	Israel	Saudi Arabia	Jordan
Qatar	Bahrain	Yemen	Oman
Iran	Turkey	Lebanon	Libya
Sudan	Djibouti	Somalia	Ethiopia
UAE	Kuwait	Cyprus	North Korea
South Korea			

in exchange for support, cooperation and/or consideration for the "War on Terror," to include but not be limited to the liberation of Afghanistan and the hunt for Taliban and Al Qaeda, and/or the Bush administration's stated policy goal of the disarmament of Iraq in accordance with the United Nations resolutions.

Request Letter dated January 6, 2003, to Abel Lopez, FOIA/PA Division, DOE, from Christopher J. Farrell, Judicial Watch, Inc. On February 5, 2003, FOI/PA responded that the search of the files of the Office of Energy Assurance, the Office of Policy and International Affairs, and the National Nuclear Security Administration (NNSA) yielded no responsive documents. Determination Letter dated February 5, 2003, from Abel Lopez, FOI/PA, DOE, to Christopher Farrell, Judicial Watch, Inc. A search of the files of the Office of the Secretary had not been completed at the time of the determination. *Id.*

On March 18, 2003, the Appellant appealed that determination to our Office. Appeal Letter dated March 17, 2003, from Christopher J. Farrell, Judicial Watch, Inc., to Director, Office of Hearings and Appeals (OHA), DOE. In the Appeal, the Appellant argues that because DOE is at the center of national and international energy policies used by the federal government, it is likely that documents responsive to the request exist. *Id.* The Appellant cites an article in the *New York Times* which stated that "The United States, seeking to ensure Turkish military cooperation in any war against Iraq, is offering at least \$4 billion to compensate Turkey for economic damage it might suffer as a result of playing an active role in an American-led coalition." *Id.* at 1-2.

Analysis

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. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department 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., Glen Milner*, 17 DOE ¶ 80,132 (1988).

We have contacted FOI/PA and the respective offices searched in response to the Appellant's request to determine what type of search was conducted. Both the Office of Energy Assurance and NNSA indicated that they primarily performed a hand search of the files which would contain possibly responsive documents. Neither office was able to find anything responsive. The Office of Energy Assurance indicated that the files searched contained a small amount of documents, therefore, it would not be possible to overlook something responsive to the request. NNSA indicated that a majority of the files were searched by hand, but a computerized search of electronic mail message files was also conducted. No responsive documents were found by either office. Based on the search that the Office of Energy Assurance and NNSA performed, we are convinced that both

these offices followed procedures which were reasonably calculated to uncover the material sought by the Appellant in its request. Accordingly, the Appeal should be denied in respect to these two offices.

The Office of Policy and International Affairs indicated “the subject matter and information requested does not have no [sic] Office of Policy and International Affairs (PI) involvement. A file search was not conducted due to no PI involvement or concern so, therefore, there are no files to be searched for the information requested.” Electronic Mail Message dated April 23, 2003, from Edith Horne, Office of Policy and International Affairs, DOE, to Janet R. H. Fishman, Attorney-Examiner, OHA, DOE. Therefore, it is apparent the Office of Policy and International Affairs did not conduct a search. It is difficult for OHA to understand how this office could claim it has nothing responsive without conducting a search when the request asks for documents relating to contacts between the federal government and a number of other countries. It seems to us that the Office of Policy and *International Affairs* would have at least some peripheral involvement with countries listed in the request and, therefore, could have responsive documents. To make the statement that it has nothing responsive without actually checking its files or databases is insufficient to satisfy the FOIA in the absence of a more complete explanation. Therefore, the Appeal will be remanded to FOI/PA to direct the Office of Policy and International Affairs either to search its files for responsive documents or to provide a detailed explanation why the Office could not possibly have any responsive documents.

It Is Therefore Ordered That:

- (1) The Appeal filed by Judicial Watch, Inc., on March 18, 2003, Case No. TFA-0025, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.
- (2) This matter is hereby remanded to the Freedom of Information and Privacy Act Group of the Department of Energy which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2003