April 12, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Fulbright & Jaworski

Date of Filing: March 2, 2006

Case Number: TFA-0151

On March 2, 2006, Fulbright & Jaworski, L.L.P. (Fulbright) filed an appeal from a determination issued to it on February 3, 2006 by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA). In that determination, NNSA responded to a request for documents Fulbright submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA determined that it could locate no documents responsive to Fulbright's request. This appeal, if granted, would require NNSA to perform an additional search and either release any responsive documents or issue a new determination justifying the withholding of those documents.

I. Background

On January 10, 2006, NNSA received Fulbright's request for "documents constituting, relating or referring to the 'review' or 'peer review' conducted in or around late 2004 by the Department of Defense (DOD), in which [NNSA] participated, involving the proposed or intended use of the Mark III [Free-Electron Laser (FEL)] (located at Duke University) by the Department of the Army and/or the University of Hawaii." Letter from Richard M. Speidel, NNSA, to Fulbright (February 3, 2006) (Determination Letter). In its determination letter, NNSA informed Fulbright that a search for information relevant to its request yielded no responsive documents. *Id*.

In its appeal, Fulbright challenges the adequacy of NNSA's search for responsive documents. In support of its argument, Fulbright maintains that NNSA "confirmed to numerous people that it participated in a 'peer review' of the University of Hawaii's proposed research with the Mark III FEL." Letter from Fulbright to OHA (March 2, 2006) (Appeal Letter). Fulbright cites several letters in which NNSA personnel inform the recipient that it "recently participated" in a review conducted by the DOD or that it "intend[ed] to conduct a peer review." *Id*. Fulbright also argues that, because the determination letter did not contain a description of the search for records, it is

unable to determine whether NNSA's search was reasonably calculated to uncover documents responsive to its request. *Id*.

II. 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. United States 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. United States 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., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003).

In reviewing this appeal, we contacted NNSA to ascertain the scope of the search. NNSA informed us that it forwarded the request to the appropriate program office, Defense Programs, and learned that no documents responsive to Fulbright's request existed. According to NNSA, although it had intended to conduct a peer review focusing on the Mark III FEL, ultimately, no such review was conducted. *See* Electronic Mail Message from Richard M. Speidel, NNSA, to Diane DeMoura, OHA (March 30, 2006). Consequently, because NNSA did not perform a peer review, it generated no documents pertaining to such a review. NNSA also stated that it believed the Department of the Army was going to conduct a peer review. NNSA stated, however, that the review "turned out to be a program review that did not focus on the Mark III" but where the Mark III FEL may have been discussed. *Id*. NNSA informed us that, although a representative of NNSA was present at the review as an observer, NNSA did not formally participate in the Army's review. *Id*. NNSA added that it did not generate any documents pertaining to the Army's review. *Id*.

Based on the foregoing information, we find that NNSA's search was calculated to uncover documents responsive to Fulbright's request and, therefore, adequate. NNSA forwarded the request to the appropriate office for a search. Personnel in that office had definitive knowledge that NNSA neither conducted a review nor formally participated in the Army's review and, therefore, generated no documents relating to those reviews. Consequently, no further search was undertaken since documents were known not to exist. Had NNSA conducted a review or formally participated in another agency's review, then one might expect that NNSA would have generated documents regarding those reviews. In such a case, a more exhaustive search would be required. In this case, however, NNSA was not required to undertake a search for documents it knew with a certainty did not exist. Accordingly, NNSA's search was adequate and, therefore, Fulbright's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed on March 2, 2006 by Fulbright & Jaworski, L.L.P., OHA Case No. TFA-0151, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 12, 2006