

**February 5, 2003  
DECISION AND ORDER**

**OF THE DEPARTMENT OF ENERGY**

**Appeal**

Name of Petitioner: Dr. Friedwardt Winterberg  
Date of Filing: December 23, 2002  
Case Number: TFA-0011

On December 23, 2002, Dr. Friedwardt Winterberg (“Winterberg” or “Dr. Winterberg”) filed an Appeal from a determination issued to him on November 18, 2002, by the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Winterberg 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. This Appeal, if granted, would require that DOE/HQ perform an additional search.

**I. Background**

Dr. Winterberg is a professor of physics at the University of Nevada in Reno, Nevada. According to Dr. Winterberg, he earned his Ph.D. in Germany in 1955, and later moved to the United States at the invitation of the United States government, where he pursued a career in academia. Letter from Winterberg to Director, OHA (December 23, 2002) (Appeal). He responded to a solicitation from the National Nuclear Security Administration (NNSA) for pre-applications in the Office of Defense Programs’ Stewardship Science Academic Alliances Program. NNSA evaluated each pre-application by determining its degree of responsiveness to the technical scope defined in the solicitation—this evaluation was not, however, a review of the merits of the application. Letter from Director, Office of Defense Science, NNSA to Winterberg (February 20, 2002). The Executive Committee responsible for the evaluation process considered Winterberg’s pre-application and found that it did not fall within the technical scope of the solicitation. Consequently, the committee did not encourage Winterberg to submit a full application. The committee did, however, explain that its decision was not a determination on the merits of the final application and that Dr. Winterberg was free to submit a full application if he so desired. *Id.*

Winterberg then sent a FOIA request to DOE asking for “ [a] copy of a report . . . made by a committee of three individuals from Livermore, Los Alamos, and Sandia. . . . I tried to get a copy of that report

through Senator Ensign . . . so far without success.” 1/ Letter from Winterberg to DOE/HQ (August 19, 2002) (Request). NNSA’s Office of Defense Science searched unsuccessfully for responsive documents. Letter from DOE/HQ to Winterberg (November 18, 2002) (Determination). In his Appeal, Dr. Winterberg argued that it was possible that the committee members rejected his application because he was a German scientist who came to this country after World War II. Appeal at 2. According to Winterberg, in 1985, Elie Wiesel, then Chairman of the President’s Commission on the Holocaust, made a public statement that it was immoral for the federal government to hire Nazi scientists. Exhibit 1 to Appeal. Therefore, Winterberg argues, because Wiesel made the statement while he was an official of the United States government, Wiesel’s statement became a government policy binding on the DOE. *Id.* In his Appeal, Winterberg asks OHA to direct NNSA to release the report and names of the committee members to him so that he can determine if they acted on Wiesel’s “order.” 2/ Appeal at 2.

## **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. 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 ¶ 80,102 (1988).

This office has analyzed the search conducted by NNSA, and we find that the search was adequate. We contacted DOE/HQ regarding the search, and they responded with an explanation, written by NNSA, of the pre-application process. Memorandum from Director, Office of Defense Science, NNSA, to DOE/HQ (September 18, 2002). The solicitation employed a two-part evaluation process for the selection of applications: (1) a pre-application evaluation stage and (2) a full application evaluation stage. During the pre-application evaluation stage, the Executive Committee did not complete reports on any evaluations. Instead, a copy of each pre-application was provided to a member of the committee. Each reviewer was tasked to review the technical scope of the pre-application and place it into one of three categories: “Yes”

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1/ The Executive Committee was composed of employees of the Lawrence Livermore National Laboratory, the Los Alamos National Laboratory, and the Sandia National Laboratory.

2/ Winterberg did not request the names of each committee member in his FOIA request. We do not generally allow a requester to expand the scope of his or her request on appeal. *See Los Alamos Study Group*, 26 DOE ¶ 80,196 (1997); *National Security Archive*, 24 DOE ¶ 80,162 (1995). Dr. Winterberg may, however, request the names through a new FOIA request.

(responsive to the technical scope), “No” (not responsive), or “Uncertain.” The reviewers did not use a formal response document, but instead advised their laboratory representatives of their decisions by any method convenient to them at the time (e.g., telephone, face-to-face conversation). Electronic Mail Message from Dr. James Van Fleet, NNSA to Brenda Washington, DOE/HQ (January 28, 2003). The laboratory representatives then reported to NNSA by electronic mail or telephone conversation. NNSA did not monitor this phase, but only recorded the categorization of each application. *Id.* Based on the results of this preliminary review, each applicant was sent a letter discouraging or encouraging them to submit a full application. Despite the results of the review, however, no applicant was prevented from submitting a full application. Dr. Winterberg’s pre-application received two Nos and one Uncertain, and NNSA sent him a letter of discouragement. The letter of discouragement did contain a statement that the decision at this stage related to the pre-application only, and did not guarantee acceptance or rejection of a final application. Letter from NNSA to Winterberg (February 20, 2002). The letter also advised the applicant how to submit a full application.

We find NNSA’s argument (that the committee did not complete written evaluation reports at the pre-application stage) to be reasonable. As described above, the pre-application evaluation phase was intended to be a fast, preliminary review and screening of the pre-applications. It was designed to provide pre-applicants some idea of how their pre-application matched the defined technical scope of the project, and was not intended to be a detailed review of the entire application. Given the informal nature of the process, we find it reasonable that no documents were created. Thus, we find that NNSA has conducted an adequate search for responsive material. Accordingly, this Appeal should be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dr. Friedwardt Winterberg on December 23, 2002, OHA Case Number TFA-0011, 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: February 5, 2003