

## Head Scratchers: Foreseeable Harm, Reasonable Searches, and Reasonable Description of FOIA Requests

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## Basic Search/Description Issues: Statutory Requirement

*"[U]pon any request for records which (i) reasonably describes such records and (ii) is made in accordance with [agency regulations] . . . [the agency] shall make the records promptly available." 5 U.S.C. § 552(a)(3)(A)(1)*

A request description must "be adequately sufficient [to enable] a professional employee of the agency who [is] familiar with the subject area of the request to locate the records with a reasonable amount of effort." FOIA Update: FOIA Counselor: Q&A, vol. IV, no. 3 (Jan. 1, 1983)

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## Basic Search/Description Issues: Applicable Legal Standards

- Duty to liberally construe a FOIA request—to select the interpretation most likely to yield the greatest number of responsive records.
- Cannot exclude relevant documents, deny access to information known to exist, or refuse to search additional locations where responsive material may be housed.
- Search adequacy is judged by the reasonableness of the **methodology** and not the "fruits" of the search, i.e., whether every responsive record was located.

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## Basic Search/Description Issues: Policy Considerations

OGIS FOIA Federal Advisory Committee  
2018 Recommendations for Improving Searches

1. OIP to collect search information in Chief FOIA Officers' reports
2. Chief FOIA Officers Council to work with CIOs to better understand technology
3. Archivist to recommend FAR be revised to consider FOIA electronic searches.

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## Basic Search/Description Issues: Case Law

**Sai v. TSA, 315 F. Supp. 3d 218 (D.D.C. 2018) (amended opinion):** finding request for all "TSA policy and/or procedures documents that were not already available through the agency's electronic reading room, including both old and current versions of those documents" not reasonably to describe records




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## Basic Search/Description Issues: Case Law

**Muckrock, LLC v. CIA, 300 F. Supp. 3d 108 (D.D.C. 2018):** ruling that the CIA's *per se* policy of "refusing to process any requests for electronic communications that do not include . . . four specific pieces of information"—the "to' and 'from' recipients, time frame, and subject"—to be unlawful and granting declaratory relief prohibiting the agency from continuing to employ it




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Basic Search/Description Issues:  
Case Law

**Valencia-Lucena v. U.S. Coast Guard, 180 F. 3d 321 (D.C. Cir. 1999):** finding that because requester provided agency with name of agency employee who possessed requested records during requester's criminal trial, "[w]hen all other sources fail to provide leads to the missing records, agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record."



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Basic Search/Description Issues:  
Case Law

**PEER v. EPA, 314 F. Supp. 3d 68 (D.D.C. 2018):** where EPA Administrator Pruitt stated on TV that he "would not agree that [CO2 created by human activity is] a primary contributor to global warming," and "there's a tremendous disagreement about the impact" of "human activity on the climate," and where requester sought all EPA documents relied upon by the Administrator in making these statements, ruling that the request "reasonably describes" records, and those records could be located by asking the Administrator



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Basic Search/Description Issues:  
Case Law



**Hemenway v. Hughes, 601 F. Supp. 1002 (D.D.C. 1985):** disapproving "no records" response for a "list" of information where other records contained the information because "requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."

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Basic Search/Description Issues:  
Case Law

**American Oversight v. GSA, 311 F. Supp. 3d 327 (D.D.C. 2018):** where responding to a request for all "records . . . Including emails," agency refused to process attachments, ruling that "GSA's blinkered literalism, distinguishing emails from email attachments, is at odds with the agency's 'duty to construe a FOIA request liberally'"



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Basic Search/Description Issues:  
Case Law

**Huntington v. Dep't of Commerce, 234 F. Supp. 3d 94 (D.D.C. 2017):** ruling that agency did not demonstrate an adequate search because it "failed to invoke the 'magic words' . . . namely, the assertion that [it] searched all locations [not most locations] likely to contain responsive documents"; finding agency's statement that it "identified offices reasonably likely to have responsive information and those offices conducted a reasonable search for responsive records" to "come close, but they ultimately do not pass muster."



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Basic Search/Description Issues:  
Case Law

**Public Citizen v. Dep't of State, 276 F.3d 634 (D.C. Cir. 2002):** favoring "date-of-search cut-off" because its use "might . . . result[] in the retrieval of more [responsive] documents" than would a cut-off based on date of request

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## Additional Thoughts from the Requester Perspective

- THOUGHTS ON THE APPLICABLE LEGAL STANDARDS
- THE IMPORTANCE OF REQUESTER-AGENCY COMMUNICATION
- THE ASYMMETRICAL DISTRIBUTION OF KNOWLEDGE

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## Final Thoughts on Search & Description

- Search efforts, Capstone, and e-Discovery
- Scoping concerns—substantive and temporal
- Subject-matter restrictions; defining "[agency] records"
- The importance of adequate search terms
- Procedural mechanics & records management
- Litigation considerations – Keeping Good Case Notes!

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## The Foreseeable Harm Standard

"An agency shall withhold information . . . only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption . . . or disclosure is prohibited by law."

5 U.S.C. § 552(a)(8)(A)(i)(I)–(II).

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### The Foreseeable Harm Standard

- Origins in the March 2009 AG Holder FOIA Memo re "presumption of openness" and discretionary release
- Codified in the 2016 FOIA Improvement Act
- Appears to place a new burden on agencies... BUT
  - How does it apply to *all* exemptions?
  - What exactly does its application entail?
  - How are agencies reacting?
- Courts are only beginning to grapple with the issue

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### Foreseeable Harm Case Law

- *Rosenberg v. Dep't of Def.*, 342 F. Supp. 3d 62 (D.D.C. 2018)
- *Judicial Watch, Inc. v. Dep't of Commerce*, 375 F. Supp. 3d 93 (D.D.C. 2019)
- *Machado Amadis v. Dep't of Justice*, No. 16-2230, 2019 WL 2211120 (D.D.C. May 22, 2019) (appeal pending)
- *Nat. Res. Def. Council v. EPA*, No. 17-5959, 2019 WL 3338266 (S.D.N.Y. July 25, 2019)
- *Nat. Res. Def. Council v. EPA*, No. 18-11227 (S.D.N.Y. Aug. 22, 2019)

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