

# Conducting an Adequate FOIA Search

Karen Finnegan Meyers  
Senior FOIA Consultant  
Koniag Government Services

Ryan Mulvey  
Policy Counsel  
Americans for Prosperity Foundation

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## Statutory Search Requirements

- ❑ “[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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## Definition of Search

- ❑ Under FOIA, a search is defined as the time spent looking for responsive material, including, if necessary, a page-by-page or line-by-line identification of material within documents.
- ❑ The adequacy of an agency's search is judged by a test of "reasonableness," which varies from request to request.
- ❑ Courts have found searches to be reasonable when:
  - ❑ agencies interpret the request broadly in order to yield the greatest amount of responsive records
  - ❑ they are based on a reasonable interpretation of the scope of the subject matter of the request, and
  - ❑ when the agency focuses on the records specifically mentioned in the request.

*American Oversight v. GSA*, No. 17-1267, 2018 WL 2088286 (D.D.C. May 3, 2018) -- where responding to a request for all "records . . . including emails," agency refused to process attachments to emails, 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.'" 3

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## Proper FOIA Requests

### FOIA specifies two requirements for an access request:

1. It must reasonably describe the records sought, and
2. It must be made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.

### How Courts Interpret "reasonably described":

*Sai v. TSA*, No. 14-403 (D.D.C. Sep. 25, 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 described.

*Muckrock, LLC v. CIA*, No. 14-997 (D.D.C. Feb. 28, 2017) -- ruling CIA's per se policy of "refusing to process any requests for electronic communications that do not include [all] four specific pieces of information," . . . [the]'to' and 'from' recipients, time frame, and subject" because they do not reasonably describe records is unlawful and granting declaratory relief prohibiting agency from continuing to employ it.

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## Reasonableness of a FOIA Search

The reasonableness of an agency's search can often depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations, or whether the agency improperly limited its search to certain record systems.

- Do agencies need to follow leads to other locations to be searched that is found in documents located after a search for responsive records?

*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."

- Do agencies need to search electronic databases for responsive information?

*Hemenway v. Hughes*, 601 F. Supp. 1002 (D.C.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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## Reasonableness of a FOIA Search

- What is the difference between conducting a search where records are most likely to exist and conducting a search where records are likely to exist?

*Huntington v. Dep't of Commerce*, No. 15-2249, 2017 WL 211301 (D.D.C. Jan. 18, 2017) -- ruling that agency has not shown that it conducted an adequate search because it "failed to invoke 'the 'magic words' concerning the adequacy of the search -- 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."

- What is the search cut-off date? How does it relate to reasonableness?

*Pub. 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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## Elements of a successful search strategy

A successful search strategy includes these steps:

- Interpret the request letter
- Identify the major concepts
- Identify related terms
- Use the right search syntax
- Conduct the search
- Review the results
- Repeat, as necessary

Agency personnel conducting the search should note in the FOIA administrative file where the searches were conducted; if an electronic search was conducted; and, what “key words” were used. This information is essential if the requester questions the search on administrative appeal or in litigation.

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## Interpret the request letter

- ✓ Review all the documentation included with the request.
- ✓ Think of who, what, where, and when:
  - Time frame?
  - The topic(s)/major concept(s)?
    - You may need to research subject to understand it, figure out its connection to agency, and to confirm spelling(s).
  - Any related topics?
  - Are requested records related to the agency/its mission?
  - Who created the documents? A specific person or a group? Do you know your agency’s hierarchy?
  - Where are records likely to exist?
    - Note relevant information – individuals, nicknames, titles, acronyms, events, locations, time periods, etc.

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## Interpret the request letter

Subject: FOIA PA Request for Vincent White  
Request for All Personal Files and Records  
Office of EEO  
From: 2008 to date of receipt from EEO Office

Please consider this letter, sent by certified mail, as a request for personal files/personnel files as available under FOIA, 5 U.S.C. 552, as amended, and under the Privacy Act of 1974.

I am requesting all routine files and statistics which are generated by the EEO Office. This has been previously requested as it concerns exculpatory evidence for my assertion that the agency is not in compliance with the law. Please note that the release of this information is important so as not to impair my due process rights.

Please provide for statistical evaluation of the following EEO information from 2008 to present:

- (a) the date(s) of complaint(s)
- (b) the base(s) of complaint
- (c) the dates on which the complaint advanced through the informal and formal steps
- (d) whether there was any finding arising from the complaint that discriminatory or retaliatory action had occurred
- (e) whether the complaint resulted in a settlement

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## Identify the major concepts

Comprehensive – you need to make reasonable efforts to find all the responsive documents

Precise – target your search so you match the scope of the request

Major concepts come directly from the request letter.

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## Related terms

Not every document will use the same terminology

Acronyms and jargon – CODEL, WMD, AD, PDAS

Different formats use different language – “Fidelity Investments Inc.” and/or “Fidelity”

How would you search for records relating to New York Life Insurance?

## Related terms

### 1 Analyze and Define Your Topic

Identify the key concepts and the related terms /synonyms

Key Concept 1:	Related Terms
_____	_____
	_____
	_____
	_____

Key Concept 2:	Related Terms
_____	_____
	_____
	_____
	_____

## Review search results

Its more than just running a query and capturing the results:

- Review search terms and compare to terms in request letter
- If multiple searchers, review all search terms used and note if searchers used different terms (and determine why)
- Verify spelling of search terms and time period used
- Review locations/records systems searched for reasonableness
  - Emails; electronic records; shared drives; personal files; paper records
- Identify leads to other locations/terms to search that are contained in documents located, and initiate additional searches, as appropriate

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## Some thoughts from the requester perspective on search

- **Applicable Legal Standard**
  - DOJ-OIP FOIA Update (Jan. 1983): “The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records within the meaning of 5 U.S.C. § 552(a)(3)(A).”
  - Searching for *all* request record *types*
  - Intersection of search methodology and the agency control analysis
- **Importance of Requester-Agency Communication**
  - Temporal Scoping
  - Key word search terms
- **Asymmetrical Distribution of Knowledge**

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## Dealing with “non-responsive” information

- A note on vocabulary: “scoping”
  - Determining the subject-matter *scope* of a request when designing a search *vs.*
  - Reviewing potentially responsive records and determining what is *actually* responsive
- **PRIOR GUIDANCE** - DOJ-OIP FOIA Update (Jan. 1995)
  - Question: “[W]hether the agency should draw a line between the different parts of a multi-subject record for purposes of processing a FOIA request that pertains to only one of the subjects contained in that document.”
  - “[S]omething not to be done by the agency lightly.”
  - Considerations:
    - Requesters often use broad language and do not understand record-keeping
    - Practical constraints: backlog, processing time/costs
  - Approach:
    - Do not scope any narrower than on a page-by-page basis.
    - Consider characteristics and content of the record
    - Communicate with the requester

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## The End of “Non-responsive” Withholdings

- *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Rev.*, 830 F.3d 667 (D.C. Cir. 2016)
  - “[N]on-responsive redactions . . . [cannot] be squared with the statute.” They “find no home in FOIA’s scheme. Rather, once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record—*i.e.*, as a unit—except insofar as the agency may redact information falling within a statutory exemption.”
  - “FOIA calls for disclosure of a responsive record, not disclosure of responsive information within a record.”
- But “the parties have not addressed the antecedent question of what constitutes a distinct ‘record’ for FOIA purposes, and we have no cause to examine the issue.”
  - *Dicta*: “Under FOIA, agencies . . . In effect define a ‘record’ when they undertake the process of identifying records that are responsive to a request.”
- No impact on general responsiveness review, *i.e.*, when considering records/documents *in their entirety*. But what if an agency claims a single *document* contains multiple *records*?

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## Identifying “non-responsive” records

- *AILA*:
  - Agencies *define* the “record” during processing.
  - “[T]he dispositive point is that, once an agency *itself* identifies a particular document or collection of material –such as a chain of emails—as a responsive ‘record,’ the only information the agency may redact from that record is that falling within one of the statutory exemptions.”
- DOJ-OIP Guidance: “Defining a “Record” Under the FOIA”
  - (1) Be guided by the Privacy Act’s definition of a “record”
  - (2) Link records to the subject of a request

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## “Record” under the Privacy Act

- The Privacy Act defines a “record,” in part, as “any item, collection, or grouping of information[.]” 5 U.S.C. § 552a(a)(4).
- OIP: “A ‘record’ can potentially constitute an entire document, a single page of a multipage document, or an individual paragraph of a document. Moreover based on the subject of a particular FOIA request, an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a ‘record’ for purposes of the FOIA.”

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## OIP's guidance (continued)

- “The nature of a FOIA ‘record’ is defined by both the content of a document *and* the subject of the request.”
- “These distinctions are most easily made when the document can reasonably be broken into discrete units.”
  - Topical headings, bulleted lists, pagination, *etc.*
- “Logically, the smaller the document, the more difficult it will be to segregate an item of information as a distinct FOIA ‘record.’”
- Practical Considerations
  - Consider how you refer to the volume of “records” in a request determination, or how you memorialize in the administrative record. It may be better to refer to “pages” rather than “records.”
  - Mark distinct “records” on multi-subject documents
- BUT SEE caselaw that cuts against OIP Guidance

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## Towards a definition of “record”

- *Cause of Action Inst. v. Dep’t of Justice*, 999 F.3d 696 (D.C. Cir. 2021)
  - Two-part challenge to processing of QFRs and OIP’s post-*AILLA* guidance
  - Although “our case law provides for a ‘range of possible ways in which an agency might conceive of a “record,”” the key is whether the agency “itself treated the [documents at issue] as unitary ‘records[.]’”
    - Here, prior to the submission of a request, the agency had treated the QFRs as a single record. And it identified the entire set of QFRs as responsive.
- So where does this leave us?
  - OIP’s guidance technically stands but conflicts with district court case law vis-à-vis particular instances of segmentation, as well as earlier guidance on “scoping.”
  - The *Cause of Action* decision seems to suggest an agency cannot, in fact, define a record while processing, but must instead attend to the maintenance of the ostensible “record” and its treatment prior to the submission of a request.
  - Can there even be an *objective* definition of a “record” for purposes of the FOIA?
  - When in doubt, communicate with the requester!

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## Determining Responsiveness: Example

### E-chain responsive to Vincent White FOIA/PA request to EEO (slide 9):

To: Rebecca Tucci, OGC  
 From: Kerry Peters, OGC  
 CC: Sean McCabe, OGC; Mark White, OGC  
 Date: May 7, 2017  
 Re: RE:RE: Weekly team summary

Thanks, team. Be aware, when we meet tomorrow, we need to discuss a new disclosure request from HSGAC that was routed to OGC. It seems the Senate is conducting oversight of EEOC spending. The press/public doesn't seem to be aware yet, and my understanding is the Committee intends to keep the matter non-public for the moment.

To: Kerry Peters, OGC  
 From: Rebecca Tucci, OGC  
 CC: Sean McCabe, OGC; Mark White, OGC  
 Date: May 5, 2017  
 Re: RE: Weekly team summary

Sean and I completed several tasks. (He's OOTO today.) Sean drafted a MSJ in *Smith*, which is due to the AUSA and will be filed by June 30<sup>th</sup>. I did some caselaw research w/r/t the new complaint Mark reviewed; it looks like we've dealt with the same fact pattern before. I've also had a request to help prep for deposition testimony in an upcoming trial. Still need to follow-up with HR about claims of refusing to advance leave.

To: Kerry Peters, OGC  
 From: Mark White, OGC  
 CC: Rebecca Tucci, OGC; Sean McCabe, OGC  
 Date: May 5, 2017  
 Re: Weekly team summary

Kerry, For this week's summary, please note that I processed a new EEO complaint (#2017-02A) and memorialized some preliminary observations regarding the complainant's allegations. I also noted additional issues to explore re: abuse of leave.

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## Summary

- ✓ A FOIA search is defined as time spent looking for responsive material, including, if necessary, a page-by-page or line-by-line identification of material within documents.
- ✓ Interpret requests broadly.
- ✓ Review the request and identify major concepts and related terms.
- ✓ Review the search results, verifying the search terms used, the time frame and the locations searched.
- ✓ Follow clear leads to additional locations to search.
- ✓ We must search everywhere it's likely responsive records will exist.

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