Advanced Procedural Requirements
Topics Covered

- **Search**: Reasonableness; Not Reasonably Described Request v. Burdensome Search; Search Terms; Custodians; Personal Email/Texts; Compiling Information v. Records Creation; Databases

- **Review**: Defining a Record; Non-Responsive Material

- **Response**: Active Track Management; Unusual Circumstances
Search Reasonableness

An agency must conduct a reasonable search, one “reasonably calculated to uncover all relevant documents.”
Search Reasonableness

- “Reasonableness” will vary from case to case
- Interpretation of scope of request must be reasonable
- Adequacy – not perfection – is the standard for a reasonable search
Search Reasonableness

These are two distinct, often conflated concepts that impact whether a request is reasonably described and whether a search can be conducted:

- Vague Words and Descriptions
- Unreasonably Burdensome Search

While these concepts should be distinctly understood, both are a form of a ‘not reasonably described’ request and should be closed as such.
Search Reasonableness

*Not Reasonably Described Request*

- Can an agency reasonably ascertain which records are being requested and locate them with a “reasonable amount of effort”?
- If no, request is not reasonably described.
- If yes, then conduct search (assuming the request is perfected).
Search Reasonableness

**Burdensome Search**

- Agencies are not required to conduct unduly burdensome searches
- What is “burdensome” depends on agency resources
- Agency must justify how search would unreasonably burden office/agency
Search Reasonableness: Search Terms

- Agency should detail list of search terms used
- Terms identified by subject matter experts
- Terms were reasonably likely to return responsive records
- Agency best positioned to identify terms

Porup v. CIA, No. 17-72, 2020 WL 1244928, at *5 (D.D.C. Mar. 16, 2020);
Search Reasonableness: Custodians

- Agency should detail list of offices/custodians searched
- Custodians identified by subject matter experts
- Custodians were reasonably likely to return responsive records
- Agency best positioned to determine which custodians are likely to have records

Searches of Personal Email and Texts

- Presumption of agency compliance with federal records retention laws, but can be rebutted

- To rebut, requester must show personal e-mails and texts used for work and employee did not comply with record retention laws and policies
Search: Compiling Information v. Record Creation

- Agency is not required to **create record** in response to a FOIA request
- Extraction of records from an agency database is not creating a new record
Database Searches

- If record is retrievable from a database, then agency needs to provide it
- Important distinction between (1) manipulating data in a database in compiling records v. (2) performing research or creating records
Database Searches

- Agency does not need to create a new database or reorganize its method of archiving data
- If requester seeks information about database (not actual content) + agency does not maintain index/listing → requires the creation of a new record
Defining an “Agency Record”

Two-part test:

1. Created or obtained by agency, AND

2. Under agency control when agency receives request.
Agency Records: Factors Considered

- Determining whether a record is an “agency record” can require looking at the totality of the circumstances related to the document's creation, use, possession, or control.
Agency Records: Factors Considered

When determining control, four factors, while not exclusive, are helpful to consider:

- Intent of document’s creator,
- Agency’s ability to use document,
- Extent to which agency personnel have read/relied on document, and
- Degree to which document has been integrated into agency files
Agency Records: Lessons from Cases

➢ Court found “use is the decisive factor”


➢ “Our cases recognize that the Burka factors are not an inflexible algorithm.” “In determining whether a document is an agency record in light of the 'totality of the circumstances,' any fact related to the document's creation, use, possession, or control may be relevant.”

*Cause of Action Inst. v. OMB*, 10 F.4th 849 (D.C. Cir. 2021)
Defining a Record

Privacy Act Definition of “Record”

- Each “item, collection, or grouping of information” on the topic of the request can be considered a distinct “record.”

- Thus, a “record” is an entire document, or could be a section of a multi-page document, or a single e-mail in an e-mail thread.
Defining a Record

Link Record to Subject Matter of Request

- Look to content of a document and the subject matter of request for guidance
- Individual sentence is generally not a distinct record.
Defining a Record

- When marking records for disclosure, the agency should mark distinct records clearly.
- When possible, the agency should release headings, bullets, and other textual content that illustrate that the document contains multiple subjects.

OIP Guidance: Defining a “Record” Under the FOIA (January 11, 2017)
Defining a Record: Lessons from Cases

- Generally, an agency should treat an email chain as a single record
- Don’t be “too literal or stingy” interpreting the request

Defining a Record: Lessons from Cases

➢ Be consistent when defining an agency record throughout the course of processing the request

➢ Consider emails and their attachments together, if emails refer to attachments

Defining a Record: Lessons from Cases

- Unrelated email attachments can be non-responsive, if outside scope of request

Review: Non-Responsive Material

- If record identified as responsive to request, then agency must disclose with redactions
- Important for agency, at the outset, to carefully and consistently define what it considers to be the “records” responsive to request
Review: Non-Responsive Material

- Once agency identifies record as responsive to request, then agency must process the entire record
- Caution against “non-responsive” record marking in record identified as responsive by agency

_Cause of Action Inst. v. DOJ_, 999 F.3d 696 (D.C. Cir. 2021)
Active Track Management

- Group requests into queues “based on the amount of work or time (or both) involved in processing requests”
- Focus both on the raw numbers of requests processed and the age of the oldest requests pending
Active Track Management

- First-In-First-Out Processing
- Adjust track determination as needed during processing
- Give requesters opportunity to narrow request for faster processing time

OIP Guidance: *Processing Reminders for the Last Quarter of Fiscal Year 2017 (July 20, 2017)*
Active Track Management

*Example*: Requester seeks ten years of correspondence between agency and a member of Congress.

A search of electronic correspondence system locates no records, and agency can respond within a short period of time.
Unusual Circumstances

Extend 20 days by an additional 10 days, if “unusual circumstances” exist + provide written notice to the requester.

- Search separate offices
- Examine voluminous records
- Consult with another agency or two or more agency components
Unusual Circumstances: Voluminous Records

- “16,000 pages of records and 15 CDs” was voluminous
- “Approximately 400 pages of records” was not voluminous
- Needing to examine hundreds of pages may not qualify, mid-hundreds might, and thousands of pages usually will
Case Citations

Am. Immigr. Laws. Ass’n v. EOIR, 830 F.3d 667 (D.C. Cir. 2016)


Cause of Action Inst. v. DOJ, 999 F.3d 696 (D.C. Cir. 2021)

Cause of Action Inst. v. OMB, 10 F.4th 849 (D.C. Cir. 2021)
Case Citations


*Davis v. DHS*, No. 11-203, 2013 WL 6145749, at *2* (E.D.N.Y. Nov. 20, 2013)

*DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015)
Case Citations


*Jennings v. DOJ*, 230 F. App'x 1, 1 (D.C. Cir. 2007)

Case Citations


Case Citations

Shapiro v. CIA, 170 F. Supp. 3d 147 (D.D.C. 2016)


Tereshchuk v. BOP, 67 F. Supp. 3d 441, 455 (D.D.C. 2014)

OIP Guidance

• Defining a "Record" Under the FOIA (January 11, 2017) https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia

• Processing Reminders for the Last Quarter of Fiscal Year 2017 (July 20, 2017) https://www.justice.gov/oip/oip-guidance/Processing_Reminders_As_Agencies_Enter_Last_Quarter_of_Fiscal_Year_2017
Questions?