

The Identity Project

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May 23, 2017

Kimberly Walton, Assistant Administrator
Office of Civil Rights & Liberties, Ombudsman, and Traveler Engagement (CRL/OTE)
Transportation Security Administration
601 South 12th St., East Bldg., E7-121S
Arlington, VA 20598-6033

Re: FOIA request 2013-TSPA-00520 (TSA13-0639)

FREEDOM OF INFORMATION ACT APPEAL

This is an appeal under the Freedom of Information Act, 5 U.S.C. §552.

On May 17, 2013, we submitted a request by e-mail to “FOIA.TSA@dhs.gov”, with a copy by postal mail, for access to and copies of “all records pertaining to 12-TSA-0092 (‘In the matter of John Brennan’)”.

You initially notified us that this request was assigned your reference number TSA13-0639. Years later, we discovered that at some unknown time, without notice to us, you had assigned this request a new reference number, 2013-TSPA-00520.

No decision was made as to whether any records would be released or whether access would be granted to any records, and we were not provided with access to or copies of any records, within the deadlines mandated by the FOIA statute.

During the many years that this request was pending, we repeatedly informed the succession of TSA staff to whom it was assigned that we wished to receive access to any copies of all responsive records in their original form.

In one e-mail message to the FOIA analyst we had been told was processing this

request, and to the FOIA Officer, for example, we wrote, “I reiterate our previous request to you and to Ms. McCoy as the FOIA Officer that access to and copies of all non-exempt records responsive to any of our pending requests, including these, be provided in electronic form, *and* that records held in electronic form be produced in the exact form in which they are held, i.e. as bitwise digital copies of the responsive electronic records, including all metadata, as found on agency (or contractor) servers, workstations, backup or archival tapes, or other digital storage devices or media. This applies to electronic records held in the form of e-mail message or mailbox files, spreadsheet files, word processing document files, ‘portable document format’ (PDF) files, or any other digital format.”

We also noted that the responsive records included all file content and filesystem metadata for the responsive files, including:

“1. The filename of each responsive digital record, as it was found on an agency or contractor workstation, server, storage device, or media.

2. The size of each such file in bytes, KB, MB, or GB.

3. The workstation, server, storage device, or media on which the file was found, and the path to the file in the filesystem on which it was found.

4. The file date(s) as recorded in the file and/or in that filesystem.”

On April 5, 2017, we were sent a CD of digital files containing purported “copies” of responsive records, with a cover letter stating that it was a “final response”. We have not yet received access to any of the responsive records, only these “copies”.

We appeal: (1) the unexplained failure to produce copies of any of the requested records in the requested format (bitwise copies of the responsive digital files), although they could readily be reproduced in that format, (2) the substitution for the requested electronic records of newly-created PDF files containing “page-view” images containing only a portion of the informational content of the responsive files, without justification for this *de facto* redaction, and (3) the improper withholding of all non-exempt responsive file and filesystem data and metadata.

1. FAILURE TO PRODUCE RECORDS IN THE REQUESTED FORMAT

Since the 1996 FOIA amendments, the FOIA statute has required that, “In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” (5 U.S.C. § 552(f)(2), effective March 31, 1997).

It is obvious that digital files are readily reproducible by the TSA (or anyone else) in the form of bitwise digital copies. But none of the responsive records were provided in that form, despite our unambiguous, repeated, written requests for files in native format.

In response to other requesters, the TSA has claimed that its standard procedures for processing responsive records and redacting exempt portions involve converting all text or other digital files to image files, and embedding them in new PDFs.

But this is irrelevant to the statutory obligation of the agency. The statute requires the production of a record in the requested format “if the record is readily *reproducible* by the agency in that form or format.” (emphasis added) There can be no plausible argument that the TSA is not readily able to reproduce digital files as bitwise copies.

The requirement to produce records in any format in which they can readily be reproduced predates the TSA’s existence. The TSA has had ample opportunity to develop procedures and acquire and learn how to use tools to enable it to comply – and if it has not chosen to do so, that is no excuse for noncompliance with FOIA requirements.

The argument that an agency can deliberately choose, for more than 20 years, not to acquire or learn how to use readily-available software (including free, open-source software) capable of editing and reproducing file formats such as the ASCII text files in which e-mail is sent, received, and stored, and can use its own (self-imposed) lack of implementation or lack of knowledge of how to use such software as an excuse not to disclose records or portions of records maintained in those formats, would create a loophole which would swallow FOIA for those categories of information.

2. SUBSTITUTION OF NEWLY-CREATED PDF FILES CONTAINING ONLY A PORTION OF THE INFORMATION IN THE RESPONSIVE RECORDS

The TSA appears to have gone through an elaborate multi-step munging process to create new and less-useful derivative files which it has substituted -- without explanation or excuse or any claim of legal justification -- for the original records.

First the responsive records -- which appear to have consisted originally of some combination of text or word processor files and spreadsheet, database, and/or word-processing document tables -- were viewed in an application program, and images of page views are captured. Then those images were redacted with some sort of image editing software. Finally the redacted images were pasted into newly-created PDF files. It’s impossible to tell which pages of the PDFs correspond to which original files.

The files (typically ASCII text files) in which e-mail messages are sent, received, and stored include, for example, extensive header data, including complete address data (“Jane.Doe@agency.department.gov”), while the “default” view in many e-mail clients shows only a “friendly” name (“Jane Doe”) and hides most of the headers. Most e-mail clients, and any text editor, can display the full headers and raw “message source” data. But the TSA FOIA office has chosen to generate or use more limited messages views.

Independently of the *per se* violation of the statutory requirement to produce responsive records in the requested format, this process results in *de facto* redaction and withholding of those portions of the informational content of the responsive records that aren't included in the "page-view" images.

No exemption was claimed as a basis for these unlawful *de facto* redactions.

3. FAILURE TO PRODUCE RESPONSIVE FILE AND FILESYSTEM DATA AND METADATA

No information whatsoever was provided as to the names or other file or other filesystem data associated with the responsive digital records in agency filesystems. This data was explicitly requested, and would in any case be included in the request for records "pertaining to" otherwise responsive records.

No exemption was claimed as a basis for withholding these records.

As the FOIA requires, we expect that you will act on this appeal and produce responsive documents within 20 working days.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project