

The Identity Project

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Christine Griggs
FOIA Appeals Officer
Office of Civil Rights & Liberties, Ombudsman and Traveler Engagement (CRL/OTE)
Transportation Security Administration
6595 Springfield Center Drive
Springfield, VA 20598-6033

(also sent by e-mail to <foia@tsa.dhs.gov>)

FREEDOM OF INFORMATION ACT APPEAL

Dear FOIA Appeals Officer:

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

On March 1, 2017, we submitted a FOIA request by e-mail to “foia@tsa.dhs.gov” for records pertaining to a notice published by the TSA in the *Federal Register*, “Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)”.

In a follow-up email message to Elliott Bellinger of the TSA FOIA Office on March 7, 2017, in response to a request for more information about our request, we clarified our request as follows:

Our request is for the entirety of the administrative record and any other records pertaining to the notice and request for comments, “Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)”, docket number TSA-2013-0001-0075, FR Doc. 2016-26958, published at 81 Federal Register 78624-78625 (November 8, 2016).

Our request includes the entirety of the administrative record related to this notice, including but not limited to any records used as the basis for any of the statements in the notice including estimates of the number of affected individuals, any records related to the legal basis for the notice or the proposed procedures described in the notice, any records related to the original notice of the TSA's "ID verification" program published on the TSA's website and in the TSA's blog in 2008, all comments including unpublished comments submitted to the TSA in response to this notice and blog post, and any records pertaining to

TSA consideration of, or response to, any of those comments.

The notice states that, "Comments may be emailed to TSAPRA@tsa.dhs.gov or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA-11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598-6011. FOR FURTHER INFORMATION CONTACT : Christina A. Walsh at the above address, or by telephone (571) 227-2062."

So a search reasonably calculated to identify responsive records would include a search of email messages and attachments received at "TSAPRA@tsa.dhs.gov", a search of comments received by the TSA PRA Officer and/or by Christina A. Walsh at the address above, and a search of records known to Ms. Walsh or to any other persons involved in preparing the notice to have been part of the administrative record of that process.

The related notices previously published on the TSA website and blog in 2008, and which are part of the requested administrative record of this notice, were at, "TSA Announces Enhancements to Airport ID Requirements to Increase Safety", June 5, 2008, <http://www.tsa.gov/press/happenings/enhance_id_requirements.shtm>, archived at <http://web.archive.org/web/20080610051740/http://www.tsa.gov/press/happenings/enhance_id_requirements.shtm>, and "New ID Requirements Begin Tomorrow", June 20, 2008, <<http://www.tsa.gov/blog/2008/06/new-id-requirements-begin-tomorrow.html>>;

"New ID Requirements: The First 48", June 23, 2008, <<http://www.tsa.gov/blog/2008/06/new-id-requirements-first-48.html>>; "ID Update and Word on the Blog", June 27, 2008, <<http://www.tsa.gov/blog/2008/06/id-update-and-word-on-blog.html>>; all archived at <<http://web.archive.org/web/20080630050739/http://www.tsa.gov/blog>>.

More than a year later, on June 21, 2018, we were sent a first interim response with some PDF files represented as containing responsive records.

On January 21, 2022, we received a final response letter by email, stating that "The processing of your request identified certain records that will be released to you." However, we did not receive the files purported to constitute the final response until February 17, 2022, when they were delivered on a CD by mail, in a package postmarked February 14, 2022.

The final response letter contained the knowingly and materially false and deliberately misleading bad-faith claim, "If you have any questions pertaining to your request, please feel free to contact the FOIA Branch at 1-866-364-2872 or 1-571-227-2300."

In fact, as you undoubtedly know and as we have advised TSA and DHS Chief FOIA Officers, FOIA Public Liaisons, FOIA Analysts, and FOIA Requester Service Center staff repeatedly over many years, whenever we have been able to obtain contact information to do so, it is not possible to contact anyone at these phone numbers. These phone numbers both go to the same "interactive voice response" system that only plays snippets of recorded messages. No matter how many hours a caller wastes exhaustively trying menu options, they will never be connected to a human or be able to leave a voicemail message at either of these numbers. The TSA's persistence in posting these and only these

phone numbers, including them in response boilerplate, and falsely describing them as numbers at which FOIA staff can be contacted, is gross bad faith and directly results in denial of requesters' statutory right to the assistance of the FOIA Public Liaison and to obtain status information.

We appeal (1) the adequacy of the search for responsive records, (2) the form and format in which these records were produced (to be more precise, the format of the newly-created files which were improperly substituted for some of the responsive files), and (3) the withholding of responsive records including (a) records not produced in any form and (b) information contained in the responsive records but not included in the newly-created file substituted for some of the responsive records.

With respect to the adequacy of the search, none of the comments – published or unpublished – submitted on the TSA blog in response to its initial notices were produced. Nor were any records produced with respect to the TSA's "moderation" of these comments and selection of which to publish and which not to leave unpublished or remove from the public TSA website and blog.

These records were specifically included in our request, and are clearly responsive to it. A search reasonably calculated to retrieve responsive records would have included a search of the TSA's web hosting systems, the content management system in use at the time of the notice for the TSA's blog (including content records and moderation or other change logs), and any backups of these, as well as any other records pertaining to these comments or moderation of, or responses to, these comments.

There is no indication in any of the TSA's interim or final responses that any search was conducted for these records, or of any basis for withholding them. Were these records not searched for? Not found? Or identified but withheld? We can't tell.

With respect to the form of production of responsive records, we requested as follows:

We request that all responsive records be provided in electronic form.

With respect to any records held in electronic form, we request that they be provided in the original electronic form in which they are held on workstations, servers, and/or backup, archival, or other storage media or devices, as complete bitwise digital copies of the original email message files, spreadsheet files, word processor document files, PDF files, or other electronic files, including any file names, file headers, embedded metadata, file system information, and all other file content.

We specifically request that you not create new documents in response to this request, not create "documents" such as page-view images or print views from digital records, and not substitute such newly-created "documents", images, or views for requested records held by you as digital files.

This explicit and unambiguous request with respect to the form and format of production of responsive records was completely ignored.

The files we were sent as "responsive records" were PDF files of collections of page-view or screenshot images. Metadata in these PDF files indicates that they were created by TSA FOIA staff months or years after our FOIA request was submitted. It appears that, having identified some number

of responsive records in the form of digital files, a TSA FOIA Officer opened each of the responsive files in some application program, captured images of some of the content of each of the responsive files, created a new PDF file, and then pasted the images into that new file. All of these images were rasterized, making text searches or text indexing impossible.

None of the responsive metadata contained in, or pertaining to, the responsive files was produced, only some new and different metadata pertaining to the newly-created substitute PDF file.

Images of content from multiple responsive files were pasted into each PDF in seemingly random order and with no index or indication of separation between images of different original files. It is impossible to determine from the files provide to us which pages of those PDFs correspond to what original files, with what filenames, or with what other original metadata.

No basis for the denial in full of our request with respect to the form and format of production of responsive records was provided, nor did the response letter acknowledge this denial.

The FOIA statute does not permit you to make up new records and substitute them for the responsive records, when records have been requested and are readily reproducible in native format.

Since the 1996 e-FOIA amendments, the FOIA statute has required, for good reason, 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).

The 1996 e-FOIA amendments, including these requirements with respect to the form and format of production of records, predate the creation of the TSA by more than five full years. TSA (and, to the extent that this was a matter of Department-level decision-making, DHS officials as well) knew or reasonably should have known, when they first established procedures for processing FOIA requests, that they were required to comply with these established statutory requirements. The ability to enable compliance with existing statutory requirements should have been part of the criteria for evaluating and procuring FOIA processing tools.

Instead, according to responses to other FOIA requests and appeals, TSA chose to procure FOIA processing software called “FOIAXpress”, and to standardize on FOIA processing procedures that “require” the use of “FOIAXpress” and the substitution of PDF files for all responsive records before the substituted files are reviewed, redacted, or disclosed.

These “requirements” are a matter of TSA (and perhaps DHS) operational procedure, but are in direct and flagrant contravention of the statutory mandate of the 1996 e-FOIA amendments.

The use of “FOIAXpress” involves an elaborate multi-step munging and substitution process. First the responsive records are viewed in an application program such as an e-mail client, and “page view” or “print view” images are captured within the client. Then those images are redacted with some sort of image editing software. Finally the redacted images are pasted into newly-created PDF files, with images generated from an arbitrary number responsive files combines into each new PDF files, with a new name and new metadata for the new file. It’s impossible to tell which pages of the substituted PDFs correspond to which original files, or any of the original filenames or metadata.

Independently of the *per se* violation of the statutory requirement to produce responsive records in the requested (native) form and 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 images pasted into the newly-created PDFs.

It should have been apparent before it was procured by the TSA that "FOIAXpress" was incapable of satisfying the requirements already in effect as part of the FOIA statute, and that it would need, at a minimum, to be supplemented by other procedures and tools for processing requests for files in other formats.

It is obvious that digital files are readily reproducible in the form of bitwise digital copies. Both TSA and DHS litigation attorneys and staff are required to have, and to be able to use, software capable of redaction and production of email message files and other file types in native format. These tools are a routine and required aspect of compliance by Federal agencies and all other parties to litigation with Federal court requirements for "e-discovery of electronically stored information". A wide variety of commercial tools for e-discovery of electronically stored information are available for this purpose. TSA and DHS could readily make these same tools, and training in their use, available to FOIA staff.

Almost twenty years after its creation, the TSA has had ample opportunity to acquire for its FOIA staff, and train its FOIA staff to use, tools already used by other offices within TSA and DHS that would enable it to comply with the 1996 e-FOIA amendments – and if it has chosen not to do so, that is no excuse for noncompliance with statutory FOIA requirements. An agency cannot use its own deliberate decision not to acquire for FOIA staff or train FOIA staff to use software (including software already used by other agency components) as an excuse not to disclose records or portions of records maintained in other formats which are, with such tools, readily reproducible in native formats.

If the TSA chose not to comply with the 1996 e-FOIA amendments when it set up its FOIA office and procedures, deliberately procured and then deliberately chose to establish procedures directing FOIA staff to rely exclusively on software it knew or should have known was incapable of fulfilling its statutory FOIA duties, failed to provide or train FOIA staff in use of software used by other agency components such as litigation staff to reproduce records in native format for e-discovery of electronically stored information, and has persisted in this knowing and willful systematic disregard for the law for almost twenty years longer, now is the time to bring its FOIA operations into compliance with the law. The law requires no less, and should countenance no further delay.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties issues
The Identity Project (PapersPlease.org)