

# 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](mailto: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 September 1, 2020, we submitted a FOIA request by e-mail to “[foia@tsa.dhs.gov](mailto:foia@tsa.dhs.gov)” for records pertaining to a Request for Information (RFI), TSA25-04-03472, “Requirements and Capabilities Analysis (RCA Office) Alternative Verification of Identity Requirements and Capabilities Analysis (RCA Office) Alternative Verification of Identity”, including the following records:

(4) Any and all records of internal metadata contained in files responsive to any portion of the request described in clauses 1-3 above.

(5) Any and all records of filesystem metadata pertaining to files responsive to any portion of the request described in clauses 1-3 above, including but not limited to any records of (a) the filename of each responsive digital record, as it was found on TSA contractor, or other third-party workstation, server, storage device, or media; (b) the size of each such file in bytes, KB, MB, or GB; (c) the name or other label or identifier of the workstation, server, storage device, or media on which the file was found; (d) the path to the file in the filesystem on which it was found; and (e) the file date(s) as recorded in the file, in that filesystem, and/or in any label(s) on physical devices or storage media.

We request that all responsive records be provided in text-searchable, unencrypted electronic form. With respect to any records held in electronic form, we request that each such record be provided in the form of a discrete file with the same name and file format as

the file is held by or on behalf of the TSA, as a complete bitwise digital copy of the original word processor file, PDF file, e-mail file, or other electronic file, including any file headers, embedded metadata, and all other file content,

For example, if records of responsive e-mail messages are held in the form of “.eml” files, we request that each such file be produced in the form of a “.eml” file with the same filename and format. Similarly, if responsive records of e-mail mailboxes are held in the form of “.mbx” files, we request that each such file be produced in the form of a “.mbx” file with the same filename and format.

We request that any responsive records of e-mail messages be produced in the form and format of the raw “message source” files, including full addresses and all headers and attachments, as those message source files are held on mail servers or backup or archival digital storage media.

We specifically request that you not create new documents or files in response to this request; not create “documents” such as page-view images or print views from digital records; not substitute such newly-created “documents”, images, or views for requested records held by you as digital files; and not split one file into multiple files or combine multiple files into one file.

More than a year later, on February 8, 2022, we received an email message including a PDF file of a final response letter and a PDF file represented as containing responsive records.

No records responsive to items (4) and (5) of our request, as quoted above, were produced in any form or format. None of the responsive records were produced in the form we had requested.

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.”

On information and belief, this knowingly and materially false and deliberately misleading bad-faith claim is included in “boilerplate” and templates for all FOIA acknowledgment letters and responses sent by the TSA FOIA Office, in order to create the false and misleading impression that the FOIA “Requester Service Center” and the FOIA Public Liaison can in fact be contacted by the public.

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 including records of responsive metadata and filesystem information 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, there is no indication that the TSA conduct any search for any of the records responsive to items (4) or (5) of our request. The failure to conduct any search for these records was plain error, and must be reversed on appeal.

With respect to the form of production of responsive records, the file we were sent as containing “responsive records” was a PDF file of a collection of page-view or screenshot images. Metadata in this PDF file indicates that it was created the day it was sent to us, more than a year after our FOIA request was submitted. It appears that, having identified some number of responsive records in the form of digital files such as those used to store archives of email messages and attachments, 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 in any form or format, only some new and different metadata pertaining to the newly-created substitute PDF file.

Images of content from multiple responsive files were pasted into one 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 file provided to us which pages of that PDF corresponds to what original files, with what filenames, or with what other original metadata.

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.

Regarding items (4) and (5) of your request, agencies are required to provide a responsive record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. This means that FOIA requests must be processed in a requested format if the capability exists to respond to the request in that format. The TSA FOIA office uses a DHS web-based application to manage the FOIA process that includes the processing and production of responsive records. This system processes all records in a PDF format. Therefore, the records are only reproducible by TSA in a PDF format. As a result of the records being converted to a PDF, the file and file system data or metadata from the raw format of the records processed are not available. Thus, TSA will be unable to produce records responsive to this portion of your request in the manner you seek.

This claim that “ the records are only reproducible by TSA in a PDF format” is false.

Like all Federal agencies and other parties to Federal litigation , the TSA is required to comply with Federal court requirements for e-discovery of electronically stored information (ESI).

TSA litigation 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, and preservation and production of filesystem information and embedded file metadata. A wide variety of commercial tools for e-discovery of ESI, including standard email storage file formats, are available for this purpose. The TSA could readily make these same tools, and training in their use, available to FOIA staff.

Email files and other files in native format are “readily reproducible” by the TSA by training FOIA staff to use the same tools used by all parties to Federal litigation for e-discovery of ESI.

And the claim that “file system data or metadata from the raw format of the records processed are not available” to the FOIA office amounts to no more than a claim that FOIA staff have improperly failed to search for or produce these records in any form format. These records exist, they are subject to FOIA, and they must be searched for and, if found, produced in some format.

The requirement 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). has been part of the FOIA statute since the 1996 e-FOIA amendments.

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, the 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.

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.

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 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)