

The Identity Project

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FOIA Appeals Officer
Office of Information Programs and Services (A/GIS/IPS)
U.S. Department of State
2201 C Street, N.W.
Washington, DC 20520
(by e-mail to <FOIAAppeals@state.gov>)

FREEDOM OF INFORMATION ACT APPEAL FOIA Case Control Number F-2011-03370/F-2021-06198

Dear FOIA Appeals Officer:

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

On April 27, 2011, we submitted a FOIA request by postal mail and by fax for specified categories of records records of the Department of State (DOS) or any DOS component pertaining to the “Supplemental Worksheet” which had been provided by the DOS to some applicants for U.S. passports, a copy of which was attached to our request. Our request included, *inter alia*, records of the criteria used by DOS to determine who to require to complete these forms, the numbers of individuals required to complete these forms, and the numbers of copies of these forms printed or distributed.

During the thirteen years during which this request has been pending, we have tried with all possible diligence, but largely unsuccessfully, to track the status of processing of this request and to obtain updated estimated dates of completion of your Department’s action on this request.

Your Department’s processing of this request has been pervaded with malfeasance and nonfeasance indicative of some combination of incompetence, negligence, and/or bad faith.

While we have received only incomplete responses to our status requests, and no response at all to most of them, we do know that your Department twice threatened to “close” this and others of our still-pending requests unlawfully for “lack of interest” (despite our many indications of continued interest), and on another occasion wrongly “closed” this request, re-opening it only years later after multiple inquiries from us. We have received apologies on three occasions from FOIA officers for the mishandling of this request in different ways at different times – but without resolving the problems.

In 2023, after repeated unsuccessful (and in most cases unacknowledged) attempts to contact the Chief FOIA Officer through the FOIA Public Liaison and the FOIA Requester Service Center, we began sending annual certified letters to the Chief FOIA Officer (we have been provided with no phone number or email address for the Chief FOIA Officer) reporting these and other problems for inclusion in their FOIA reports and seeking a meeting to discuss these problems and the systemic changes needed to avoid their repetition. To date, we have received no acknowledgement or response to these letters, which were sent and signed for as received in April 2023 and April 2024. We reiterate that request for a meeting with the Chief FOIA Officer in light of the problems discussed in this appeal.

Finally, we received a response to this request by USPS, postmarked July 31, 2024.

We appeal (1) the adequacy of the search for responsive records, (2) the failure to produce all responsive records including segregable non-exempt portions of records, (3) the failure to specify the volume of responsive records withheld as exempt, (4) the failure to preserve responsive records while the request was pending, and (5) the failure to produce records in the form and format in which they were requested, even though they are readily reproducible by your Department in that form and format.

The “Supplemental Questionnaire” that was the subject of the requested records was succeeded, while this request was pending, by DOS Forms DS-5513 (OMB Control Number 1405-0214) and DS-5520 (OMB Control Number 1405-0215), both first approved by OMB in 2013.

In its application to the Office of Management and Budget (OMB) for approval of Form DS-5513, submitted in 2012 while this FOIA request was pending, the DOS stated that, “The DS-5513 form has been created to correct a procedure that might have been inconsistent with the Paperwork Reduction Act.... Field offices have, in the past, sent the applicant a letter containing a questionnaire asking for the supplemental information. The Department has become aware of this procedure and is now seeking OMB approval to rectify the oversight.”¹ An identical statement acknowledging ongoing use without OMB approval of the form that would become DS-5520 was also filed with OMB.²

The DOS also told OMB that, “The DS-5513 is a new collection based on the previous internal Information Request Letter (IRL) titled, ‘Non-Institutional Birth with Questionnaire’. To estimate the number of respondents per year, the Department ran a report using our Management Information System (MIS) to determine the number of these IRLs filed in 2011 by every passport agency and acceptance facility. The results revealed that in 2011, 900 letters were filed along with the DS-11....

“The DS-5513 will be produced by a contractor... The contractor has provided an estimate of approximately \$28.00 per thousand forms. It was estimated that at minimum, the initial delivery of one package of 50 forms would be provided to each passport acceptance facility (9000 plus acceptance facilities) which totals 450,000 forms at \$28.00 per thousand.”³

1. “SEPARATE STATEMENT EXPLAINING EXISTING COLLECTION IN USE WITHOUT AN OMB CONTROL NUMBER, Supplemental Questionnaire to Determine Entitlement for a U.S. Passport, OMB Number 1405-XXXX, DS-5513” <<https://www.reginfo.gov/public/do/DownloadDocument?objectID=34055001>>.
2. “SEPARATE STATEMENT EXPLAINING EXISTING COLLECTION IN USE WITHOUT AN OMB CONTROL NUMBER, Supplemental Questionnaire to Determine Identity for a U.S. Passport, OMB Number 1405-XXXX, DS-5520”, <<https://www.reginfo.gov/public/do/DownloadDocument?objectID=34054101>>
3. “SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION, Supplemental Questionnaire to Determine Entitlement for a U.S. Passport, OMB Number 1405-XXXX, DS-5513” <<https://www.reginfo.gov/public/do/DownloadDocument?objectID=34054902>>.

This information and the underlying records from the MIS and the estimate for printing of forms are obviously responsive to this request, but were not produced. They were readily retrievable by DOS staff preparing submissions to OMB in 2012, while this request was pending, and could have been retrieved equally readily in response to this request. A search reasonably calculated to retrieve records responsive to this request would have included a search for these and related records in the MIS or its archives, the records of the DOS office and staff responsible for preparing submissions to OMB, and the archived email messages, including attachments, of that office and those staff members.

It's unclear, in the absence of any information about the search for responsive records or the volume of responsive records withheld, whether these records were not searched for, found but withheld, or destroyed while this request was pending – any of which would be in violation of FOIA and/or the Federal Records Act (FRA), 44 U.S.C. § 3101 *et seq.*, and applicable regulations.

According to the DOS response to this FOIA request, “As for the older Supplemental Worksheets used prior to 2013, the worksheets are obsolete and no longer available.... As it relates to request (3) above, data is not available for the usage of older supplemental worksheets.”

Whether these versions are “obsolete” is irrelevant to whether they are agency records subject to FOIA. And it is unclear why they are “no longer available”. They clearly were available to DOS staff preparing submissions to OMB, even well after this request was submitted. And the FRA and records schedules promulgated by the DOS and the National Archives and Records Administration (NARA) pursuant to the FRA require that records responsive to FOIA requests be retained, to enable judicial review, as long as a FOIA request is pending and for at least six years after the completion of all processing, administration appeals, and any action on remand after any administrative appeals.

If these responsive records held by the DOS at the time this FOIA request was received are “no longer available” because they were destroyed while this request was pending, that is strong evidence of a possible violation of the FRA by DOS staff. Pursuant to the FRA, each Federal agency is required to investigate allegations of violations of the FRA. “The agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to NARA” (36 CFR Part 1230.14). Failure to make such a report is itself a further violation of the FRA.

Accordingly, we request that you confirm that you have reported any destruction of records responsive to this request, while this request has been pending, to NARA as a violation of the FRA.

An unspecified volume of responsive records were withheld as purportedly exempt:

Your request (4) for policies, procedures, standards, and guidelines must be denied. This denial is in accordance with subsection (b)(5) of the Freedom of Information Act, which exempts intra-agency and inter-agency memoranda or letters that are protected by legal privileges.

Your request for (5) and (5) above must also be denied. This denial is in accordance with subsection (b)(s) of the Freedom of Information Act, which exempts intra-agency and inter-agency memoranda or letters that are protected by legal privileges.

We appeal this withholding and claimed exemption. No indication is given as to what legal

privilege would apply to policies and procedures that have been adopted by the DOS, including those that determine criteria for passport processing and issuance and the substantive and procedural rights of passport applicants, and we do not believe that there is any such applicable privilege.

In addition, the FOIA statute and DOS FOIA regulations require that, if information is withheld as exempt, “The denial... must include... An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation.”

No such estimate was provided. This is, in itself, a violation of FOIA. Moreover, the failure to specify the volume of records withheld suggests the possibility that these records were not searched for or retrieved, on the assumption that even if found, they would be claimed to be exempt. But a proper determination of exemption can be made only after responsive records are retrieved and reviewed.

It is especially critical in this case, in which some responsive records have apparently already been destroyed while this request has been pending, that all responsive records, including those claimed, after retrieval and review, to be exempt, be preserved while this appeal and the six-year statute of limitation for initiation of litigation following completion of agency action remain pending.

Accordingly, in addition to appealing the failure to specify the volume of records withheld as exempt, we request that you confirm that all responsive records, including all such records claimed to be exempt, have been retrieved and are being preserved. If this hasn't already been done, time is of the essence to avoid further destruction of responsive records and additional violations of the FRA.

With respect to the form of production of responsive records, we requested as follows: “To minimize unnecessary delay, and because most of the responsive documents are likely to be already in electronic form, please send your response by e-mail in addition to any paper copy.”

We have reminded the DOS of our request with respect to the form and format of production of responsive records repeatedly over the years that this request has remained pending. In a letter we sent to the DOS on August 4, 2016, addressed to Mr. Eric F. Stein, Co-Director, Acting, Office of Information Programs and Services requesting the status of this and our other pending requests and appeals, we reiterated and further clarified this request as follows:

Please reply... to... confirm that you have noted in each of these case files that we strongly prefer to be contacted by telephone and/or e-mail, and that we have requested that access to and copies of responsive records be provided in electronic form, and for records found in electronic form (such as e-mail messages, word processor or spreadsheet files, digital photographs, digital and video files, etc.) that copies be provided as bitwise copies of each complete file containing any responsive records, and for e-mail messages including both the raw message “source” file with all headers and bitwise copies of all attachments.

In a letter in response dated August 25, 2016, Mr. Stein apologized for “the letter that was sent asking you to confirm your continued interest in your requests.” In that letter, Mr. Stein also stated, “I confirm that the four case files [which included this request F-2011-03370] have been annotated to indicate that you strongly prefer to be contacted by telephone and/or email and that you request that any released material be provided to you in electronic format.”

The FOIA statute at 5 U.S.C. §552 (a)(3)(B) requires 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.”

In addition, the DOS FOIA regulations at 22 CFR Part 171.13 provide that, “The Department will, to the extent practicable, communicate with requesters having access to the internet using electronic means, such as email or a web portal.”

Despite this unambiguous request and these unambiguous statutory and regulatory requirements, no responsive records were provided by email or in any electronic form. Our request with respect to the form and format of production was not mentioned in the DOS response, and no basis was claimed for the failure to provide records, including records held by DOS in electronic form, in that form. Paper printouts were generated from the responsive electronic records and then sent to us by postal mail, rendering the response much less useful and gratuitously delaying our receipt of it.

Any competent and diligent FOIA processor, acting in good faith, would have been aware of our request and the statutory and regulatory requirements with respect to the form and format of production of requested records. The failure to produce any of the requested records in the form requested or in any electronic form is yet more evidence of the bad faith which has pervaded the handling and mishandling by the DOS of this and our other FOIA requests and appeals.

The criterion in the FOIA statute is whether the records are readily reproducible by “the agency” in the requested form and format, not whether they are readily reproducible by the FOIA office of the agency. On information and belief, and assuming that the DOS complies with its e-discovery obligations, these records are readily reproducible in the requested format by the DOS – “the agency” -- through the use of e-discovery software used by DOS litigation attorneys and staff.

The DOS has and regularly uses, in litigation, e-discovery software that can readily reproduce records in PDF, word processor, and email message formats. The responsive records are readily reproducible in native form and format by “the agency” (the DOS) through the use of these tools.

Failure to provide and train FOIA staff in the use of these tools readily available to, and in fact used by, other agency staff is not a lawful basis for failing to use them to reproduce electronic records responsive to FOIA requests in native form and format, when that form and format is requested.

Please reply by email to confirm your receipt of this appeal and advise the reference number assigned to this appeal, the point of contact for updates on the status of this appeal, and the estimated date of completion of of action on this request, including action on this appeal.

Sincerely,

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