



Advocates for Government Accountability

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September 25, 2015

VIA CERTIFIED MAIL

Mr. Rob Park
Acting Principal Deputy General Counsel
Department of the Army
Office of the General Counsel
104 Army Pentagon, Room 2E724
Washington, D.C. 20310

Re: Freedom of Information Act Appeal, FOIA No. FA-15-0231

Dear Mr. Park:

This is a timely administrative appeal from the Department of the Army's final response to Cause of Action's Freedom of Information Act ("FOIA") request concerning records related to telephone or video conferences arranged by the military or hosted on military systems for any component within the Executive Office of the President ("EOP"). Specifically, Cause of Action appeals the Army's failure to conduct an adequate search for potentially responsive records. Cause of Action also preemptively challenges, if applicable, the Army's reliance on any of the FOIA "exclusions" and its possible determination that the requested records are not "agency records" for the purposes of FOIA.

Procedural Background

On June 26, 2015, Cause of Action submitted a FOIA request to the Army seeking access to all records of communications with any employee of EOP, including but not limited to the Office of the White House Counsel ("OWHC"), concerning telephone or video conferences arranged by the military or hosted on its information systems.¹ Cause of Action indicated that responsive records would include any e-mail requesting that a conference line be opened, as well as any subsequent confirmation e-mail or related correspondence.² The time period for this request was January 1, 2015 to the present.³

¹ Letter from Cause of Action to U.S. Dep't of the Army, Freedom of Info. & Privacy Office (June 26, 2015) (attached as Exhibit 1). Cause of Action also sought a public interest fee waiver and treatment as a representative of the news media status for fee purposes. The Army has not issued a fee determination.

² *Id.*

³ *Id.*

On August 19, 2015, the Army acknowledged receipt of Cause of Action's request and assigned it a tracking number.⁴ The Army did not indicate an estimated date of completion for the processing of Cause of Action's request, but intimated that it required additional time beyond the statutory response period of twenty (20) working days.⁵ On September 22, 2015, the Army issued its final response after it determined that it had conducted a reasonable search and that "no responsive documents exist under [its] purview."⁶

The Army Failed to Conduct an Adequate Search for Potentially Responsive Records

FOIA requires an agency to undertake a search for responsive records that is "reasonably calculated to uncover all relevant documents."⁷ In considering the sufficiency of such a search, the agency's search methods must be determined adequate "consistent with congressional intent titling the scale in favor of disclosure."⁸ At the least, an agency's search must include "all files likely to contain relevant documents,"⁹ that is, all locations or systems where potentially responsive records are likely to be found.¹⁰ In this case, the Army's final response falls short of the required reasonableness and is, therefore, inadequate.

Cause of Action's FOIA request seeks records of correspondence between the military and EOP that would reflect the manner by which EOP arranges and hosts video and telephone conferences lines through the White House Military Office ("WHMO") and the White House Communications Agency ("WHCA").¹¹ Previously released records confirm that such lines are maintained for EOP by the military as communications facilitator. In one e-mail, for example, McGavock Reed, former Assistant General Counsel at the Office of Management and Budget ("OMB"), received a confirmation notice from an Army-maintained e-mail account for an upcoming "audio conference" set-up for the purpose of conducting a FOIA consultation with

⁴ Letter from Paul V. DeAgostino, Supervisory Counsel, Dep't of the Army, Freedom of Info. & Privacy Office, to Cause of Action (Aug. 19, 2015) (attached as Exhibit 2).

⁵ *Id.* (citing *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)).

⁶ Letter from Paul V. DeAgostino, Supervisory Counsel, Dep't of the Army, Freedom of Info. & Privacy Office, to Cause of Action (Sept. 22, 2015) (attached as Exhibit 3)

⁷ *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

⁸ *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (citation omitted).

⁹ *Am. Immigration Council v. Dep't of Homeland Sec.*, No. 12-856, 2014 U.S. Dist. LEXIS 27737, at *12 (D.D.C. Mar. 5, 2014).

¹⁰ *See Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (agency must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested"); *Elkins v. Fed. Aviation Admin.*, No. 14-476, 2014 U.S. Dist. LEXIS 119585, at *9-10 (D.D.C. Aug. 28, 2014).

¹¹ Cause of Action acknowledged in its request that the records it seeks may be maintained by various components within the Department of Defense. WHMO, for example, accepts details from multiple branches of the armed forces; records created by these detailees during their assignment to White House military units are subject to FOIA. *See* 32 C.F.R. § 286.4(i)(7). To the extent Cause of Action's request implicates records under the control of multiple Defense components, the Army has a responsibility to forward or refer Cause of Action's request, in relevant part, to those components. *Id.* §§ 286.4(i), 286.23(g). In this instance, it appears the Army satisfied this obligation, although there may be additional components beyond the Defense Information System Agency that ought to have been sent search memoranda. *See* Final Response Letter, *supra* note 6.

attorneys at OWHC and others.¹² This record, and similar others, would be directly responsive to Cause of Action's FOIA request.

Clearly, responsive records exist. Given the time period of Cause of Action's request, and the number of components and employees within EOP, the claim that the Army has *no* responsive records is demonstrably false. And despite the Army's allegations that it directed the Defense Information System Agency, which coordinates the operations of WHCA, to conduct a search, the details of the relevant search memorandum have not been provided in the Army's final response, nor has the Army provided an explanation for why a "no records responsive" was deemed appropriate in light of the stated mission of WHCA to "provid[e] premier, worldwide, vital information services and communications support to the president and his staff."¹³ Had a search been conducted using the details provided in Cause of Action's FOIA request – and should new search be conducted using the information set forth in Exhibit 4 – responsive records would be readily available. Such a search is far from unreasonable for the Army to conduct.

As the Army has failed to describe with adequate specificity how it sought to identify responsive materials, and considering the existence of at least one record that ought easily to have been located,¹⁴ it seems clear that the Army has not undertaken a search "reasonably calculated to uncover all relevant documents."¹⁵ The Army must therefore carry out a new search and provide a detailed response "setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched."¹⁶

Potentially Responsive Records Are Not Excluded Under FOIA and Are Agency Records

To the extent the Army has issued its response in reliance on the FOIA "exclusions," this reliance is misplaced and the record exclusion is unlawful.¹⁷ The records requested by Cause of Action (1) cannot be withheld under Exemption (b)(7)(A); (2) do not implicate informant records maintained by a criminal law enforcement agency; and (3) are not records controlled by the Federal Bureau of Investigation pertaining to foreign intelligence, counterintelligence, or international intelligence. Therefore, any exclusion of potentially responsive records from the requirements of FOIA is unlawful and the Army must conduct another search and review.

Further, it should be noted that any potentially responsive records qualify as "agency records" of the Army, as that phrase is understood in the FOIA context. The records requested were either created or obtained by the Army, and these records were under the control of the

¹² E-mail from McGavock Reed, Assistant Gen. Counsel, Office of Mgmt. & Budget, to "system.manager@conus.army.mil" (Jan. 2, 2014) (attached as Exhibit 4).

¹³ *White House Communications Agency*, DEF. INFO. SYS. AGENCY, <http://www.disa.mil/Careers/WHCA> (last visited Sept. 23, 2015); see Jim Tice, *White House has jobs open for many ranks, specialties*, ARMYTIMES (Mar. 4, 2015), <http://www.armytimes.com/story/military/careers/army/2015/03/04/white-house-communications-agency/24272209/> ("Soldiers assigned to [WHCA] provide telecommunications support to the president, vice president, first lady, U.S. Secret Service and White House staff.").

¹⁴ *Cf. Boyd v. U.S. Marshal Serv.*, No. 99-2712, 2002 U.S. Dist. LEXIS 27734, at *4 (D.D.C. 2002 Mar. 15, 2015) (agency should explain why a particular report, which is known to exist, has not been located).

¹⁵ *Weisberg*, 705 F.2d at 1351.

¹⁶ *Oglesby*, 920 F.2d at 68.

¹⁷ 5 U.S.C. 552(c)(1)-(3); see generally *Steinberg v. Dep't of Justice*, No. 93-2409, 1997 U.S. Dist. LEXIS 8890 (D.D.C. June 17, 1997).

Army at the time when Cause of Action submitted its FOIA request.¹⁸ Given the nature of the aforementioned OMB e-mail, further records relating to audio or video conferences are maintained on Army servers, should be accessible from these servers, and have been used for official purposes by Army officials.¹⁹

Conclusion

The demonstrable existence of Army records responsive to Cause of Action's request, in conjunction with a reasonable assumption about the frequency of video and audio conferences in which EOP engages and the stated purpose of WHCA, calls into question the Army's claim that it possesses no responsive records. Further, for the reasons set forth above, potentially responsive records cannot be excluded under 5 U.S.C. 552(c) and qualify as "agency records" under the control of the Army. Accordingly, Cause of Action respectfully requests that the Army remand Cause of Action's FOIA request for a supplemental search that is reasonably calculated to locate all responsive records.

Thank you for your immediate attention to this matter. If you have any questions, please contact me by e-mail at ryan.mulvey@causeofaction.org or by telephone at (202) 499-4232.

Sincerely,



RYAN P. MULVEY
COUNSEL

¹⁸ *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

¹⁹ *See Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (factors for agency "control").